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In The Supreme Court of the United States

October Term, 2010

MICHAEL LONECKE, RAYMOND DUFFY, ANNE NELSON, ROBERT S. FASH, and CRAIG A. HARRIS, Individually and on behalf of all those similarly situated, and WILLIAM WOODWARD, Individually and on behalf of all those similarly situated,

Petitioners,

v.

CITIGROUP PENSION PLAN, PLANS ADMINISTRATION COMMITTEE OF CITIGROUP, INC., CITIGROUP, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ERISA's prohibition against backloading is violated by not applying the fractional rule in all years and by testing compliance with the fractional rule only at separation of service, rather than on a year-by-year basis?

LIST OF PARTIES

The parties to this action are all listed in the caption: The Petitioners, Michael Lonecke, Raymond Duffy, Anne Nelson, Robert S. Fash, and Craig A. Harris, Individually and on behalf of all those similarly situated, were Plaintiffs-Appellees-Cross-Appellants in the courts below, William Woodward, Individually and on behalf of all others similarly situated, was a Plaintiff-Appellee in the courts below; Respondents, Citigroup Pension Plan, Plans Administration Committee of Citigroup, Inc., and Citigroup, Inc., were Defendants-Appellants-Cross-Appellees in the courts below.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Lonecke v. Citigroup Pension Plan*, 584 F.3d 457 (2d Cir. 2009) (Reprinted at Appendix 141a-168a). The Court of Appeals reversed the ruling of the district court granting partial summary judgment to Petitioners on various grounds, including: first, that the Plan violated ERISA's minimum benefit accrual rules through its use of the "fractional rule;" and second, that Respondents violated ERISA's § 204(h) notice requirement. The decision of the district court was issued on December 11, 2006 and can be found at *In re Citigroup Pension Plan ERISA Litigation*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006) (Appendix 1a-66a). Subsequent district court decisions can be found at 241 F.R.D. 172 (S.D.N.Y. 2006) (Appendix 67a-104a); No. 05-Civ-5296, 2007 U.S. Dist. 27004 (S.D.N.Y. Apr. 4, 2007) (Appendix 105a-122a); No. 05-Civ-5296, 2007 U.S. Dist. LEXIS 86145 (S.D.N.Y. Nov. 20, 2007) (Appendix 123a-140a).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The initial subject matter jurisdiction was based on 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331, as this matter arose under the Employee Retirement Income Security Act, a federal law.

The Second Circuit's opinion was issued on October 19, 2009. Re-hearing was sought and was denied on January 12, 2010 (Appendix 169a-170a).

CONSTITUTIONAL AND STATUTORY PROVISIONS, COURT RULES INVOLVED

ERISA Section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B):

> A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph -
>
> > (i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;
> >
> > (ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;
> >
> > (iii) the fact that benefits under the plan may be payable to certain

> employees before normal retirement age shall be disregarded; and
>
> (iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

ERISA Section 204(b)(1)(C), 29 U.S.C. § 1054(b)(1)(C):

> A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan

> (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

and 26 C.F.R. § 1.411(b) - 1(a)(1):

> (a) *Accrued benefit requirements*——(1) *In general.* Under section 411(b), for plan years beginning after the applicable effective date of section 411, rules are provided for the determination of the accrued benefit to which a participant is entitled under a plan. Under a defined contribution plan, a participant's accrued benefit is the balance to the credit of the participant's account. Under a defined benefit plan, a participant's accrued benefit is his accrued benefit determined under the plan. A defined benefit plan is not a qualified plan unless the method provided by the plan for determining accrued benefits satisfies at least one of the alternative methods (described in paragraph (b) of this section) for determining accrued benefits with respect to all active participants under

the plan. A defined benefit plan may provide that accrued benefits for participants are determined under more than one plan formula. In such a case, the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative methods. A plan may satisfy different methods with respect to different classifications of employees, or separately satisfy one method with respect to the accrued benefits for each such classification, provided that such classifications are not so structured as to evade the accrued benefit requirements of section 411(b) and this section. (For example, if a plan provides that employees who commence participation at or before age 40 accrue benefits in a manner which satisfies the 133 1/3 percent method of determining accrued benefits and employees who commence participation after age 40 accrue benefits in a manner which satisfies the 3 percent method of determining accrued benefits, the plan would be so structured as to evade the requirements of section 411(b).) A defined benefit plan does not satisfy the requirements of section 411(b) and this section merely because the accrued benefit is defined as the "reserve under the plan". Special rules are provided for

the first two years of service by a participant, certain insured defined benefit plans, and certain reductions in accrued benefits due to increasing age or service. In addition, a special rule is provided with respect to accruals for service before the effective date of section 411.

(2) *Cross references*——(i) *3 percent method.* For rules relating to the 3 percent method of determining accrued benefits, see paragraph (b)(1) of this section.

(ii) *133 1/3 percent method.* For rules relating to the 133 1/3 percent method of determining accrued benefits, see paragraph (b)(2) of this section.

(iii) *Fractional method.* For rules relating to the fractional method of determining accrued benefits, see paragraph (b)(3) of this section.

(iv) *Accruals before effective date.* For rules relating to accruals for service before the effective date of section 411, see paragraph (c) of this section.

(v) *First 2 years of service.* For special rules relating to determination of accrued benefit for first 2 continuous years of service, see paragraph (d)(1) of this section.

(vi) *Certain insured plans.* For special rules relating to determination of accrued benefit under a defined benefit plan funded exclusively by insurance contracts, see paragraph (d)(2) of this section.

(vii) *Accruals decreased by increasing age or service.* For special rules relating to prohibition of decrease in accrued benefit on account of increasing age or service, see paragraph (d)(3) of this section.

(viii) *Separate accounting.* For rules relating to requirements for separate accounting, see paragraph (e) of this section.

(ix) *Year of participation.* For definition of "year of participation", see paragraph (f) of this section.

(b) *Defined benefit plans.* A defined benefit plan satisfies the requirements of section 411(b)(1) and this paragraph for a plan year to which section 411 and this section apply if it satisfies the requirements of subparagraph (1), (2), or (3) of this paragraph for such year.

(1) *3 percent method*——(i) *General rule.* A defined benefit plan satisfies the requirements of this paragraph for a plan year if, as of the close of the plan year, the accrued benefit to which each

participant is entitled, computed as if the participant separated from the service as of the close of such plan year, is not less than 3 percent of the 3 percent method benefit, multiplied by the number of years (not in excess of 33 1/3) of his participation in the plan including years after his normal retirement age. For purposes of this subparagraph, the "3 percent method benefit" is the normal retirement benefit to which the participant would be entitled if he commenced participation at the earliest possible entry age for any individual who is or could be a participant under the plan and if he served continuously until the earlier of age 65 or the normal retirement age under the plan.

STATEMENT OF THE CASE

1. In 1999, Citigroup converted its traditional, final pay pension formula into a cash balance formula effective January 1, 2000. The new formula provided for a hypothetical individual account for each participant to which Citigroup would contribute hypothetical percentages of compensation ("Benefit Credits"), and hypothetical earnings based on a variable interest rate tied to an outside index ("Interest Credits").

2. Because a cash balance plan is a defined benefit plan, *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), it must comply with at least one of the three minimum accrual rules in ERISA Sections 204(b)(1)(A), (B) or (C), 29 U.S.C. §§ 1054(A), (B), or (C), known as the 3%, the 133 1/3%, and the fractional rules. *Id.*, 229 F.3d at 158-59. Because generally cash balance plans are based on career-average compensation, cash balance plans can comply only with the 133 1/3% accrual rule. The particular rule "requires that the value of the benefit accrued in any year may not exceed the value of a benefit accrued in any previous year by more than 33%." *Esden*, 229 F.3d at 167, n. 18.

3. Although the percentage of compensation contributed by Citigroup to participants' accounts increases by more than one third based on increasing age and service, nevertheless, as in *Esden*, "the Plan may still qualify under the 133 1/3 percent test because of the value of the interest credits compounded annually through normal retirement age,"

id., a compounding that favors younger workers. Because compliance with the 133 1/3% rule depends on the interplay between Benefit Credits, which increase with age, and Interest Credits, which decrease with age, and because Interest Credits are based on a variable interest rate, compliance with the 133 1/3% rule depends on the interest rate remaining sufficiently high to offset the increase in Benefit Credits, *i.e.*, in Citigroup's Plan, no less than 4.01%.

4. In order to insure compliance with the 133 1/3% rule regardless of the amount of the variable interest rate, Citigroup could have adopted 4.01% as its minimum interest rate, as the cash balance plan did in *Esden* in order to comply with the 133 1/3% rule. *Esden*, 229 F.3d at 167, n. 18. Alternatively, Citigroup could have provided for an automatic upward adjustment of Benefit Credits when the variable interest rate became lower than 4.01%. This device was suggested recently by the IRS in Revenue Ruling 2008-7, Rev. Rul. 2008-7, 2008-1 C.B. 419. Citigroup, however, devised a third unorthodox alternative.

5. Citigroup provided that, when the Plan's rate of accrual did not meet the 133 1/3% test, participants' accounts would be made to comply with the fractional rule of accrual. Because that rule, however, is inapplicable to a career-average benefit formula, Citigroup created an alternative, final-average formula in Article 4.1(e) of the Plan ("Minimum Account"). According to this provision, if the variable interest rate dips below 4.01%, Citigroup calculates the "Minimum Account" under Article 4.1(e) and adds the difference - which it refers as a "top-up"

amount to the participants' accounts, in a purported effort to comply with ERISA's minimum accrual rules.

6. The District Court held that Citigroup misapplied the fractional rule in Article 4.1(e) when it held that only the 133 1/3 % rule could be applied to cash balance plans. The District Court ordered Citigroup to bring the Plan's benefit formula into compliance with the 133 1/3% rule. On appeal, the Petitioners and Respondents agreed that the fractional rule can be applied to cash balance plans, but differ on how it should be applied.

7. The misapplication of the fractional rule caused its employees to lose a substantial portion of their pension benefits, as it resulted in a violation of ERISA's prohibition against backloading benefits. Citigroup did so by testing compliance with the fractional rule only once, at separation from service, rather than on a year-by-year basis, as befits the letter and purpose of a rule that governs the rate of accrual. Another device used by Citigroup to backload benefits and prevent its employees from obtaining their rightful pensions was its reliance on the 133 1/3% rule in some years and on the fractional rule in others.

8. The Second Circuit Court of Appeals reversed the District Court and ruled that Citigroup's Article 4.1(e) fix to the backloading problem does not violate ERISA and that its calculation of a participant's pension upon separation from employment comports with the fractional rule. The Second Circuit held that the rate of benefit accrual during a participant's employment is unimportant as

long as proportional benefits are paid at the time of departure. 584 F.2d at 469. Petitioners appeal to this Court from that part of the Second Circuit's ruling.

9. The Court of Appeals' reversal resulted in a significant pension loss for more than one hundred thousand class members, who were former and current participants of Citigroup, Inc. This ruling decided an important question of federal law that has not been directly addressed by this Court. This Court, has, however, suggested *in dicta*, that the Second Circuit is incorrect. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512, n. 9, (1981), the Court noted that the fractional rule "is essentially a pro rata rule under which, *in any given year*, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age." (Emphasis added). The pension loss that can result from the improper application of the fractional rule in this context can affect pensioners in similar plans if left as is. Therefore, this Court must settle this important federal question.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents an opportunity for the Court to address a significant question of federal law that has not been, but should be, squarely addressed by this Court. As noted earlier, and which will be explained in more detail below, the Second Circuit's opinion concerning the application of the fractional rule deprives over one hundred thousand pensioners a substantial portion of their pensions, by not applying the fractional rule in all years and by testing compliance with the fractional rule only at separation from service, rather than on a year-by-year basis. This determination can have a wide-ranging affect on participants in similar pension plans because the application of utilizing the fractional rule in this manner will deprive them of a substantial portion of their pensions if this ruling is left uncorrected.

I.

Citigroup Short-Changed Its Employees Out Of A Substantial Portion Of Their Pensions By Both Applying Different Accrual Rules In Different Years, And By Misapplying The Fractional Rule

A. The Second Circuit Incorrectly Ruled That Citigroup May Apply Different Accrual Rules for the Same Participants in Different Years

The sole basis for the Second Circuit's

contention that Citigroup may apply the 133 1/3 rule in some years and the fractional rule to the *same* participants in years when a decrease in the variable interest rate causes the Plan to violate the 133 1/3 rule is its reliance on Rev. Rul. 2008-7, 2008-1 C.B. 419. The Second Circuit does not rely on any section of ERISA, a precedent of this Court, or even an administrative regulation to deprive over 100,000 participants of the full value of their pension benefits.

The Second Circuit's reliance is misplaced for several reasons. First, the plan formula in I.R.S. Revenue Ruling 2008-7 complies with the 133 1/3% rule for all but a small sub-group of participants, namely, grandfathered participants who are age 50 to 55, a "classification" which the Ruling found not to be "so structured to evade the accrued benefit requirements..." Rev. Rul. 2008-7; 2008-7 I.R.B. 419. There are no "classifications," however, in the Citigroup Plan.

Second, if the Ruling could be read to support Citigroup's year-to-year application of different accrual methods, the Ruling would be neither "authoritative administrative materials [sic]" nor "["c]onsistent with 26 C.F.R. §1.411(b)-1(a)(1)." In fact, the Ruling would be clearly inconsistent with that Regulation, which requires that the same test must apply "with respect to all active participants under the plan." It would also be inconsistent with IRS Doc. 6390, which provides: "It is not permissible for a plan to satisfy one test in a given year and fail that test in a second year, even though it might satisfy another of the three tests in the second year." p. 8. Such inconsistency, particularly

when coupled with a complete lack of reasoning, negates any deference to Ruling 2008-07, as found by other courts. *See, e.g., Hurlic v. S. Cal. Gas Opinion Co.*, 539 F.3d 1024, 1034 (9th Cir. 2008), where the Court held that the Ruling "provided little in the way of reasoning" and was, therefore, "unpersuasive." As noted by this Court, an "unreasoned statement ... can[not] trump a formal regulation with the procedural history necessary to take on the force of law." *Cent. Laborers' Pension Fund v. Heinz*, *supra*, 541 U.S. 739, 748 (2004).[1]

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[1]IRS Document 6390, Rev. 12-98, constitutes an authoritative interpretation of the IRS' position on minimum accrual rates for defined benefit plans, and therefore is entitled to *Chevron*-style deference. The Supreme Court has limited *Chevron* deference to express Congressional delegations of interpretative authority, and to situations where legislative delegation to an agency is implicit. *See Chevron USA, Inc. v. Natural Res. Def. Council, INc.*, 467 U.S. 837, 844 (1984). An agency's reasonable, consistently held interpretation of its own regulations is entitled to deference. *INS v. National Center for Immigrants Rights*, 502 U.S. 183, 189-190 (1991). Furthermore, an agency publication that is a "fair and considered" interpretation of the law is entitled to deference, regardless of its form. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

In a similar context, the Second Circuit specifically addressed the issue of the level of deference accorded to the IRS for its authoritative position set froth in an informal notice - a publication that is akin to Doc 6390 because the Notice similarly "describes the existing regulatory scheme and explains how the IRS interprets this to apply to cash balance plans." *Esden*, *supra*, 229 F.3d at 172. The Court held that despite the "form of publication," the publication warranted full *Chevron*-style deference because the position articulated was "consistent and reasonable." *Id*, 229 F.3d at 169; *see also Long Island Care at*

Third, permitting compliance with different accrual methods in different years for the *same participants* would run counter to the purpose of permitting the application of different accrual methods to different "classifications" of employees. That purpose - as reflected in the legislative history of 26 C.F.R. §1.411(b)-1(a)(1) - was to permit "classifications" based on different negotiated contribution rates, with the benefits under each contribution rate to be tested separately. *See* Treasury Decision 7501, 1977-2 C.B. 133, T.D. 7501 (1977), which first added the provision to the Regulation, based on written and oral comments at a public hearing held on April 20, 1976.[2] The Treasury Decision(s) stated in pertinent part:

Home, Ltd. v. Coke, 551 U.S. 158 (2007) (high degree of interpretative deference due to the DOL's post-litigation Advisory Memoranda, despite the fact that the memo was issued only to DOL personnel and was created in direct response to the impending litigation); *Weil v. Ret. Plan Admin. Comm. of the Terson Co., Inc.*, 933 F.2d 106 (2d Cir. 1991) (court granted *Chevron* deference to IRS position as articulated in an *amicus* brief).

[2]26 C.F.R. §1.41 1(b)- I (a)(1), as it first appeared in the Temporary Regulations issued by the IRS in 1975, provided that a defined benefit plan "must provide only one method for the computation of accrued benefits," with no mention of employee "classifications." 40 Fed. Reg. 51, 421 (Nov. 5, 1975) ("Preamble"), and 40 Fed. Reg. 51, 429 (Section 1.411(b)-1(a)(1)), "Accrued benefit requirement"). Similarly, the Proposed Regulations, also published on November 5, 1975 for comment and subject to a public hearing, contained the same one-accrual-method requirement for all employees. 40 Fed. Reg. 51, 445("Preamble") and 40 Fed. Reg 51, 446 (1.411(b)-1(a)(1); "Accrued benefit requirement").

> A statement has also been added to the final regulations to allow plans to set up classifications and test accrued benefits with respect to such classifications separately from the accrued benefits with respect to other classifications. *It was specifically contemplated that this provision would allow different negotiated contribution rates and benefit levels*, e.g., one benefit for a 50 cent an hour contribution and another benefit for a dollar an hour contribution, with the benefits under each contribution rate to be tested separately. (Emphasis added)

Fourth, applying different accrual methods to the *same* employees in different years would evade the purposes of ERISA's minimum accrual standards, as illustrated by the example set forth in IRS Document 6390, Rev. 12-98, p. 8:

> For example, a plan that accrues a benefit rate of 1.5 percent for the first six years of participation, 2 percent for the next 6 years, 14 percent in the 13th year and 2.6 percent in later years would satisfy the 133 1/3 percent test for the first 12 years only while satisfying the fractional test in the 13th and later years but not before.

The plan in the example does not satisfy either the 133 1/3% or the fractional rule. The reason is that

the rate of accrual in the thirteenth year is more than one third greater than in any earlier year, thereby violating the 133 1/3% rule. It also violates the fractional rule, because it does not comply with it until the 13th year, when the accrued benefit catches up with the minimum benefit required by the fractional rule. If such a formula were lawful as determined by the Second Circuit, it would make a mockery of the prohibition against so structuring a benefit formula "as to evade the requirements of section 411(b) contained in 26 C.F.R. §1.411(b)-1(a)(l).

Finally, testing compliance with the fractional rule on a year-by-year basis is also required by the fact that a participant is entitled to be informed of the exact amount of his accrued benefit at least once a year. ERISA Section 105(a)(2)(A)(i), 29 U.S.C. § 1025(a)(2)(A)(i), requires the plan administrator once a year upon request of any participant to furnish in writing "on the basis of the latest available information - (I) the total benefits accrued ..." Inasmuch as an employee's request to know his accrued benefit can be made each year, the plan administrator is required to apply and comply with the fractional rule each year, not only upon separation from service.

B. The Lawful Year-By-Year Application Of The Fractional Rule Shows The Extent To Which Citigroup Short-Changed Its Employees

The purpose of Citigroup's violation of the fractional rule becomes self-evident when comparing the "top-up" amounts produced by Plaintiffs' lawful year-by-year application of the fractional rule with Citigroup's unorthodox application.

For example, in the case of a 45-year old participant with 20 years of service at separation, Citigroup's actuary calculates the "top-up" amount to be $ 8,921.00 (*i.e.*, $ 168, 730 - $ 159,809) (A-1501). In the case of 65-year old participant with 40 years of service this calculation is $0. Pursuant to Citigroup's actuary, the maximum "top-up" amount," $ 30,198, occurs at age 60 with 35 years of service.

By contrast, when applying the fractional rule on a year-by-year basis (based on the same assumptions), Petitioners' actuary found that significant additional amounts must be added to the account balances in most years (A-1707, ¶9), (A-1714, Exhibit 3). These calculations show that the "top-up" amount after 40 years of participation for an employee age 65 is $159,485, in sharp contrast to Citigroup's $0.

Those "top-up" amounts - as measured on a year-by-year basis - are even greater if the fractional rule is applied starting at ages 21 and 18, rather than only at age 25. As shown by Petitioner's actuary, utilizing the proper application of the fractional rule

starting at age 21, the "top-up" amount required to be added to the account balance by the time such a participant reaches age 65, *i.e.*, after 44 years of service, is $ 251,979 (A-1707, ¶ 10; A-1718). A similar calculation for 47 years of service starting at age 18 would yield an additional $ 345,893. (A-1707, ¶ 10; A-1716). As the District Court correctly held, Citigroup's "unlawful application of the fractional rule ... had the effect of keeping accrual rates below the minimum rate prescribed by statute." 470 F.Supp. 2d at 339.

C. The Second Circuit Incorrectly Decided That ERISA Requires a Plan to Comply with the Fractional Rule Only at Separation from Service

(1) The Language Of The Fractional Rule Requires Testing Compliance Each Year

The Second Circuit relied upon the language of the fractional rule to hold that the test be applied only at separation from service. That language in pertinent part is as follows:

> A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age ...

29 U.S.C. §1054(b)(1)(C).

The Court's sole focus was on the phase "upon his separation from service," and it used this phase to deny over 100,000 participants the full value of their pensions. In doing so, the Second Circuit overlooked the fact that it is the "plan" that must satisfy the test, and that it must satisfy it with regard to "any participant." Because participants separate from service every year, a plan cannot satisfy the fractional rule unless it satisfies it in the present and all future years. *See, e.g.*, 26 C.F.R. §1.411(b)-1(b)(3)(iii) (Example 2) (when the accrued benefit starting with the eleventh year of participation would be less than the statutory minimum, the *plan* does not comply with the rule, regardless of the fact that it complied in the first ten years).

The District Court correctly decided this issue when it relied on *Alessi v Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512, n. 9 (1981), which noted that the fractional rule "is essentially a pro rata rule under which *in any given year*, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age." (Emphasis added.) The District Court also relied on 26 C.F.R. §1.411(b)-1(b)(3), which, as summarized in IRS Document 6390, Rev. 12-98, p. 12, provides:

> The fractional rule operates to prevent back-loading and ensures a proportional rate of benefit accrual. It compares the part of the final benefit payable to a

> participant *at any time* (for example, accrued benefit) to the normal retirement benefit." (Emphasis added)

Numerous court decisions also support the year-by-year application of the fractional rule. *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F.Supp. 258, 269 (S.D.N.Y. 1997), the Court held that "[t]he Fractional Rule is satisfied if the accrued benefit as of a *given participation year* is not less than the following: Normal Retirement Benefit x Actual Years of Participation/Years of Service from Entry to Normal Retirement Age." (Emphasis added) Similarly, *Hoover v. Cumberland, Maryland Area Teamsters Pension Fund*, 756 F.2d 977, 981 (3d Cir. 1985), held: "The plan must provide a formula under which each participant's actual accrued benefit under the plan can be determined *in each plan year*." (Emphasis added). *Hoover* relied on I.R.S. Technical Information Release 1403 (Sept. 17, 1975), which stated:

> An accrued benefit, then, represents the interest in a retirement benefit that a participant earns *each year*, and a plan must state a method or formula for determining a participant's annual accrual rate. This requirement enables a worker to mark his or her progress toward the full pension benefit due at retirement.

Hoover, 756 F2d at 981-82. (Emphasis added).

(2) The Legislative History Also Supports Testing Application Of The Fractional Rule Each Year

The fractional rule was first introduced in the Senate on April 18, 1973, as part of the Nixon administration's proposed "Individual Retirement Benefits Act of 1973," and referred to the Committee on Finance. Leg Hist, pp. 325.[3] It referred to "an employee's accrued benefit as of any applicable date ..." Leg Hist, p. 330. The administration's proposal was incorporated into S 1179, which had been introduced on March 16, 1973, and also referred to the Committee on Finance, as was S. 1631, which was introduced in the Senate on April 18, 1973 Leg Hist, p. 325.

On August 21, 1973, S.1179, as amended, was reported out of the Finance Committee under the title "Comprehensive Private Pension Security Act of 1973." Leg Hist, p. 780. Except for editorial changes, it contained the same fractional rule provision as S.1631 and, like S.1631, referred to "an employee's accrued benefit as of any applicable date." Leg Hist, p. 839-40. The Report that accompanied S.1179, referred to the fractional rule benefit as the benefit "on the date in question" and "the date when the computation is being made." Report 93-383, p. 51, August 21, 1973. Leg Hist, p. 1119.

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[3]All references to "Leg Hist" are to the "*Legislative History Of The Employee Retirement Income Security Act of 1974*," Prepared By The Subcommittee On Labor Of The Committee On Labor And Public Welfare, United States Senate, April 1976, U.S. Gov. Printing Office, Washington, 1976.

On March 4, 1974, the Senate passed H.R. 2, which contained the same fractional rule provision as S 1179 (as subsequently adopted in S. 4, Leg Hist, pp. 1292-93, and in H.R. 4200, Leg Hist, pp. 1904-05.). Because the version of H.R. 2 adopted by the House contained the 3% and the 133 1/3% rules, which had originated in the House, but not the fractional rule, which originated in the Senate, a Conference Report on H.R. 2, dated August 12, 1974, recommended adding the fractional rule to the other two. The version of the fractional rule recommended by the Conference Committee contained for the first time the "upon his separation from service" phrase adopted by Congress and relied upon by Citigroup. The Conference Committee's explanation, however, continued to refer to "the date in question" and "the date when the computation is being made." Conf Report, p. 274, Leg Hist, p. 4541. Thus, it is quite clear that the change was merely editorial, not substantive, and that a plan's compliance with the fractional rule must be tested each year, not only upon separation from service as incorrectly held by the Second Circuit.

CONCLUSION

For the reasons stated above, the writ should be granted and the case set down for argument.

Dated: April 12, 2010

Respectfully submitted,

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APPENDIX A - DECISION OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED DECEMBER 12, 2006

LEXSEE 2006 U.S. DIST. LEXIS 89565

In re CITIGROUP PENSION PLAN ERISA LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

MASTER FILE: 05 Civ. 5296 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

470 F. Supp. 2d 323; 2006 U.S. Dist. LEXIS 89565

December 11, 2006, Decided
December 12, 2006, Filed

SUBSEQUENT HISTORY: Class certification granted by *In re Citigroup Pension Plan ERISA Litig., 241 F.R.D. 172, 2006 U.S. Dist. LEXIS 92000 (S.D.N.Y., 2006)* Reversed by, Complaint dismissed at *Lonecke v. Citigroup Pension Plan, 2009 U.S. App. LEXIS 22878 (2d Cir. N.Y., Oct. 19, 2009)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff participants filed an action against defendants, a plan sponsor and an administrator, alleging that a pension plan was

impermissibly backloaded, produced an illegal whipsaw, used an unlawful accrual formula, and discriminated based on age in violation of the Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C.S. § 1001 et seq.*, and that they did not receive notice of amendments. The parties filed summary judgment motions.

OVERVIEW: The notice that purportedly was sent to participants regarding cash balance amendments to the plan contained a summary of how the cash balance formula would work, but the notice did not include specifics or mention the plan's application of the fractional rule as the mechanism for complying with ERISA's minimum accrual standards. The court held that the plan's cash balance formula misapplied the fractional rule in a way that violated *29 U.S.C. S. § 1054(b)(1)(C)* because § *1054(b)(1)(C)* permitted the fractional rule to be applied only to participants with ten or fewer years of service and the plan's attempt to comply with this limitation by calculating average compensation based only on the last ten years of an employee's service and making a lump-sum contribution if the amount in an individual's hypothetical account was less that the minimum required by the fractional rule permitted the backloading that the fractional rule was designed to prevent. The court held that the amendments never took effect because the participants did not receive notice of the plan's unorthodox application of the fractional rule. The court concluded that cash balance plans discriminated based on age.

OUTCOME: The court granted summary judgment in favor of the participants on their claims for impermissible backloading, violation of ERISA's minimum accrual tests, age discrimination, and failure to meet notice requirements. The court denied the participants' motion for summary judgment on the whipsaw claim. The court denied defendants' summary judgment motion and ordered defendants to reform the plan to comply with ERISA.

CORE TERMS: accrual, notice, fractional, retirement age, formula, accrued benefits, benefit plans, plan year, age discrimination, backloading, credited, retirement benefit, pension plan, retirement, hypothetical, pension, accrue, plan amendments, years of service, summary judgment, interest rate, whipsaw, annuity, reduction, vesting, annual, employee benefits, career, older, future benefit

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > General Overview

[HN1] Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c).*

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN2] An issue of fact is genuine if the evidence is such that a jury could return a verdict for the

nonmoving party.

Civil Procedure > Summary Judgment > Standards > Materiality

[HN3] A fact is material when it might affect the outcome of a suit under the governing law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

[HN4] A summary judgment movant has the burden of demonstrating that no genuine issue of material fact exists.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants

[HN5] To defeat a motion for summary judgment, a non-moving party must raise a genuine issue of material fact that does not rely on conclusory allegations or unsubstantiated speculation. To do so, it must do more than show that there is metaphysical doubt as to the material facts.

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > General Overview

[HN6] In determining whether a genuine issue of material fact exists, the court must construe the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in that party's favor.

Governments > Legislation > Statutes of Limitations > Time Limitations
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Statutes of Limitations
[HN7] Although the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001 et seq.*, does not prescribe a statute of limitations for civil actions, where parties seek to recover higher benefits from a pension plan, the appropriate statute of limitations is the limitations period specified in the most analogous state statute. The six-year statute of limitations applicable under New York law does not begin to run until there has been a repudiation by the fiduciary which is clear and made known to the beneficiaries. Typically, the statute of limitations period begins when a participant's formal application for benefits is denied. In some circumstances, however, the time period may begin earlier.

Pensions & Benefits Law > Employee Benefit Plans > Cash Balance Plans
Pensions & Benefits Law > Employee Benefit Plans > Defined Benefit Plans
[HN8] Although cash balance plans mimic some of the same features of defined contribution plans, in the Second Circuit they are treated as defined benefit plans. The regulatory consequences of this defined benefit plan classification are wide-reaching. One

critical consequence is that the term "accrued benefit" under a cash balance plan means a participant's accrued benefit determined under the plan expressed in the form of an annual benefit commencing at normal retirement age.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Accrual

[HN9] Although the Employee Retirement Income Security Act of 1974, *29 U.S.C. S. § 1001 et seq.*, does not require pension plans to pay out a specific dollar amount, it does regulate the rate at which benefits accrue. *29 U.S.C. S. § 1054(b)(1)*. A paramount reason for this is to prevent "backloading," a term of art describing a plan's use of a benefit accrual formula that postpones the bulk of an employee's accrual to her later years of service.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > General Overview Tax Law > Federal Income Tax Computation > Retirement Plans > General Overview

[HN10] There is significant statutory overlap between the Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.0 S. § 1001 et seq.*, and the Internal Revenue Code (I.R.C.) on matters such as funding, vesting and benefit accrual. This is because much of Title I of ERISA, codified at Title 29 of the United States Code, was duplicated in Title II, which was codified as amendments to the I.R.C. While the

Internal Revenue Service has primary jurisdiction and rule-making authority over these ERISA provisions, regulations prescribed by the Secretary of the Treasury under I.R.C. §§ 440 and 441 shall also be used to implement the related provisions contained in ERISA, and § 3002(c) of ERISA, 29 U.S.C.S. § 1202(c) specifically adopts the regulations promulgated under *I.R.C. §§ 410(a), 411,* and *412.*

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Accrual

[HN11] *See 29 U.S.C.S. § 1054(b)(1)(B).*

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Accrual

[HN12] Under *29 U.S.C. S. § 1054(b)(1)(C),* a plan satisfies the fractional rule if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date on which any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not

exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. In simpler terms, under the fractional rule, in any given year, benefit accrual is based upon the assumption that the participant will continue, until normal retirement age, to earn the same rate of compensation that would have been taken into account under the plan had the employee retired in that year.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Accrual
Tax Law > Federal Income Tax Computation > Retirement Plans > Defined Benefit & Hybrid Plans (IRC secs. 411, 414, 415)
[HN13] The accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age. If the benefit is paid at any other time (*e.g.*, on termination rather than retirement) or in any other form (e.g., a lump sum distribution, instead of annuity) it must be worth at least as much as that annuity. The actuarial equivalent is determined by projecting the account balance forward to normal retirement age using a plan's prescribed projection interest rate and then discounting it back to present value using the applicable statutory interest rate (discount rate). If the plan's projection rate exceeds the discount rate, then

the present value of the accrued benefit will exceed the participant's account balance. A "whipsaw" has occurred. If the larger amount is not paid out, an impermissible forfeiture has occurred in violation of § 203(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.0 S. *§ 1053(a),* and *I.R.C. § 411(a)(2).*

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Anticutback Rules
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Plan Amendment
[HN14] In order to safeguard benefits that have been promised to employees, Congress enacted notice requirements that forbid plan sponsors to amend a plan in a way that reduces future benefit accrual without notice to plan participants. Congress predicated the legitimacy of plan amendments on two critically important provisions of the Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C.S. § 1001 et seq.* First, ERISA's anti-cutback rule protects employees' expectations in their accrued benefits by prohibiting amendments that would decrease the accrued benefit of a participant under a plan. Second, § 204(h) of ERISA, *29 U.S.C. S. § 1054(h),* forbids plan sponsors to amend a plan in a way that reduces future benefit accrual without notice to plan participants. Providing adequate notice is a precondition to the effectiveness of plan amendments. An ERISA amendment takes place at the moment when employees are properly informed of a change in

the text of the plan.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Anticutback Rules
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Plan Amendment
[HN15] *See 29 U.S.C. S. § 1054(h).*

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Anticutback Rules
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Plan Amendment
[HN16] Guidelines promulgated by the Internal Revenue Service clarify that notice under § 204(h) of the Employee Retirement Income Security Act of 1974, *29 U.S.C. S. § 1054(h)*, is required where an amendment is reasonably expected to change the amount of the future annual benefit commencing at normal retirement age. *63 Fed. Reg. 68,681 (1998).* Specifically, whether an amendment provides for a significant reduction in accrual rates under *29 U.S.C.S. § 1054(h)* is determined based on reasonable expectations taking account the relevant facts and circumstances at the time the amendment is adopted. In order to comply, notices may contain a summary of the amendment, rather than the text of the amendment, if the summary is written in a manner calculated to be understood by the average plan participant. *63 Fed. Reg. 68,681, 68,682 (1998).*

Appendix A

Pensions & Benefits Law > Employee Benefit Plans > Defined Benefit Plans
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Accrual
Pensions & Benefits Law > Equal Protection > Age
[HN17] *See 29 U.S.C.S. § 1054(b)(1)(H)(i).*

Pensions & Benefits Law > Employee Benefit Plans > Cash Balance Plans
Pensions & Benefits Law > Equal Protection > Age
[HN18] Cash balance plans unlawfully discriminate on the basis of age.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Suits to Recover Plan Benefits
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Equitable Relief > General Overview
[HN19] The Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001 et seq.*, provides for the civil enforcement of its provisions. Under § 502(a)(1)(B) of ERISA, *29 U.S.C. S. § 1132(a)(1)(B)*, a participant or beneficiary may bring an action to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. The statute further provides that

plaintiffs may seek (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. *29 U.S.C. S. § 1132(a)(3).*

Governments > Legislation > Interpretation
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Accrual

[HN20] Section 204(b)(1)(H)(i) of Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C. S. § 1054(b)(1)(H)(i)*, prohibits the reduction of an employee's benefit accrual because of the attainment of any age. The preeminent canon of statutory interpretation requires the court to presume that the legislature says in a statute what it means and means in a statute what it says there. By its own terms, the ERISA age provision protects individuals of all ages.

Governments > Legislation > Interpretation
Pensions & Benefits Law > Employee Benefit Plans > Defined Benefit Plans
Pensions & Benefits Law > Employee Benefit Plans > Defined Contribution Plans
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Accrual

[HN21] "Accrual," using its dictionary meaning and in line with the structure of defined benefit plans, refers to what an employee accumulates, whereas

"allocation," using its dictionary definition and in line with the structure of defined contribution plans, refers to what an employer puts into the account. When Congress uses particular language in one section of a statute and different language in another, the court presumes its word choice was intentional. If Congress had intended for "the rate of an employee's benefit accrual" to mean "the rate at which amounts are allocated to the employee's account," it would have copied those terms from the analogous provision.

Governments > Legislation > Interpretation

[HN22] The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

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For Defendants: Myron Rumeld, Esq., Proskauer Rose LLP, New York, New York.

JUDGES: Shira A. Scheindlin, U.S.D.J.

Appendix A

OPINION BY: Shira A. Scheindlin

OPINION

[*326] **OPINION AND ORDER**

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Michael Lonecke, Raymond Duffy, Anne Nelson,Robert S. Fash and Craig A. Harris, on behalf of themselves and a class of similarly situated individuals, filed consolidated actions alleging that the Citibuilder Cash Balance Plan ("Plan") violates the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), *29 U.S.C. § 1001 et seq.* In summary, plaintiffs lodge three challenges against the Plan. *First*, they challenge the legality of the Plan's accrual formula. *Second*, they assert that because Plan participants never received adequate notice of Plan amendments in 2000 and [**2] 2002, those amendments never took effect as a matter of law. *Third*, plaintiffs argue that the Plan unlawfully discriminates on the basis of age.

Specifically, plaintiffs allege in Counts I and II, respectively, that the Plan is impermissibly backloaded due to insufficient interest credits and that even if this backloading is cured, the Plan will produce an illegal accrual phenomenon known as a "whipsaw." In Count III, plaintiffs allege that the Plan's

"fractional test" method of computing accrued benefits is precluded [*327] under ERISA and, in the alternative, the test is being wrongfully applied. In Counts IV and V, plaintiffs allege that the Plan discriminates based on age. Count VI has been withdrawn. In Count VII, Plaintiffs allege that Citigroup Inc., and its Plans Administration Committee ("defendants") failed to provide Plan participants proper notice that the 2000 and 2002 cash balance amendments ("CBAs") would reduce the rate of future benefit accrual.

On August 25, 2006, the parties filed cross-motions for summary judgment on all counts. [1] For the reasons set forth below, summary judgment for plaintiffs is granted in part and denied in part. Summary judgment for defendants [**3] is denied.

1 Plaintiffs also moved for class certification, which I will address in a separate Opinion.

II. BACKGROUND

A. Cash Balance Plans

Under a cash balance pension plan, an employer guarantees each participant a retirement benefit premised on a hypothetical account that has been established in each participant's name. These accounts grow over time according to a predetermined formula, driven by two components: (1) the employer's

hypothetical "contributions," expressed either in dollars or a specified percentage of the participant's current yearly salary (making it a "career average" formula); and (2) hypothetical earnings expressed as interest credits, which can either increase at a fixed rate or be tied to an extrinsic index, such as 30-year Treasury bonds. Employer contributions and interest credits are usually allocated to the accounts annually. Each year participants receive a balance statement so they can review the value of their pension.

Since 1985, when cash balance plans were [**4] first introduced, they have become an increasingly popular way to structure retirement pensions. As of 2004, "nearly one-third of Fortune 100 companies had adopted some form of cash balance plan, and a 2002 survey of firms with pension plans containing more than 1000 participants revealed that 10 percent of plans were cash balance plans." [2] Proponents of cash balance plans maintain that from an employee's perspective, they are superior to traditional defined benefit plans because they are easier to understand and they allow benefits to accrue more evenly over the course of a career. They are also more portable than other defined benefit plans, thus allowing workers to change jobs without experiencing significant reductions in benefits. [3] It is also commonly accepted that cash balance plans are advantageous for employers in that: (1) they are cheaper and less administratively burdensome to maintain; (2) employers retain funding flexibility as long as plans remain solvent; (3) their simplicity fosters employees'

appreciation for the value of their pensions; (4) they can significantly reduce future payouts overall, thereby boosting their earnings; and (5) employers reap the benefit [**5] of any investment experience on plan assets that exceeds the interest rate assumption.[4]

2 John H. Langbein, et al., *Pension and Employee Benefit Law* 62 (4th ed. 2006) ("Langbein") (citation and quotation marks omitted).

3 *See generally Regina T. Jefferson, Striking a Balance in the Cash Balance Plan Debate, 49 Buffalo L. Rev. 513 (2001).*

4 *See Esden v. Bank of Boston, 229 F.3d 154, 158 (2d Cir. 2000); see generally Dan M. McGill, et al., Fundamentals of Private Pensions 262-64 (8th ed. 2005) ("McGill").*

B. Citigroup's Cash Balance Plan

Both parties have agreed to all material [*328] facts.[5] The named plaintiffs are present or former employees of either Smith Barney or Citibank, N.A., both of which are divisions of Citigroup Inc. ("Citigroup").[6] They all accrued benefits under the Plan during all or part of the period since January 1, 2000.[7] Two named plaintiffs were vested participants at the time their employment terminated.[8]

5 *See* Joint Stipulations ("Joint Stips.").

[**6]

6 *See id.* PP 1-6.

7 *See id.* P 7. The cash balance plan at issue here is one of three pension plans that presently comprise the Citigroup Pension Plan ("Citigroup Plan"). *See id.* P 8.
8 *See id.* P 7.

1. January 1, 2000 CBA

In October 1998, Citicorp merged with Travelers Corporation ("Travelers"), and their respective pension plans also merged. [9] Importantly, the provisions on plan amendments set forth in the Travelers Plan were incorporated into the Citibank Plan as of December 31, 1998. Pursuant to these provisions, authority to amend the Citibank Plan was vested with the plan sponsor, Citigroup, "by action of its Board of Directors" ("Board"). [10]

9 *See id.* PP 2, 14, 15.
10 *Id.* P 14.

In a meeting on October 19, 1999, the Board exercised this authority by adopting a series of resolutions going to the heart of plaintiffs' case. Pertinent excerpts of the meeting minutes state: [**7]

> an amendment to the Citigroup Inc. Pension Plan incorporating the cash balance design for certain subsidiaries of the Company, on substantially the terms as previously presented to the Board is hereby approved . . . . [11]

Appendix A

11 Minutes of the 10/19/99 Board meeting ("10/19/99 Minutes"), Ex. 4 to Joint Stips. This resolution refers to an earlier presentation on employee benefits made to the Board on March 16, 1999, by Paul J. Collins, Vice Chairman of Citigroup. Collins' presentation included a report on how a cash balance formula could be incorporated into the Citigroup Pension Plan. *See* Joint Stips. P 16.

Although the provisions of the amendment were not set forth in an executed Citibuilder Retirement Plan document until May 2001,[12] plan participants did receive notification of the amendment in December 1999 -- after the Board's vote and prior to the CBA's effective date, January 1, 2000. Notice was mailed to all effected employees by a letter dated December 9, 1999, from Tim Peach, Director [**8] of Retirement Benefits.[13] Attached to the letter was a document entitled -- in large boldfaced letters -- "The Citigroup Pension Plan Notice of Significant Reduction in Benefit Accruals for Certain Employees of Citigroup Inc. and its Subsidiaries" ("December 1999 § 204(h) notice").[14] This notice contained a general summary of how the cash balance formula would work, as well as a table listing the percentages of [*329] salaries that would be credited to accounts annually, such percentages being based on an employee's age and years of service.[15] The notice did not include specifics or mention the Plan's application of the fractional test for compliance with statutory accrual principles. Readers with questions were directed to "[p]lease see

the brochure titled *Your New Citigroup Benefits*, which [they] received earlier this year, for more details." [16]

12 *See* Joint Stips. P 18; 5/27/01 Action of Senior Human Resources Officer Michael Schlein ("Schlein Action"), Ex. 7 to Joint Stips. The 2000 CBA was also described in a summary plan description dated January 1, 2001, but this document was not made available to employees until June 2001. See Joint Stips. P 18. As of January 2000, information about the 2000 CBA was also available on the Company intranet, as part of a question and answer document ("Q & A Doc.") offering information to Plan participants about their new benefits. See Q & A Doc., Ex. 15 to Joint Stips.

[**9]

13 *See* 12/9/99 Letter and Attachments from Tim Peach ("December 1999 § 204(h) notice"), Ex. 16 to Joint Stips.

14 *Id.* At least one named plaintiff, Lonecke, recalls receiving this notice at his residence in late 1999. *See* Joint Stips. P 31.

15 *See* December 1999 § 204(h) notice.

16 *Id.*

As noted above, the provisions of the newly adopted cash balance plan were not set forth in a written document until May 27, 2001. [17] Plan Article 4.1 lays out the funding scheme giving rise to plaintiffs' claims, and states, in pertinent part, as follows:

Appendix A

4.1 Accounts

(a) General. The Account of a Participant shall be the sum of the Interest Credits and Benefit Credits credited to the Account established for such Participant following his entry into this Plan in accordance with Article II. The opening balance for each Participant in his Account shall be zero. Notwithstanding any provision to the contrary, in no event shall an Account be credited with any amount prior to January 1, 2000.

(b) Benefit Credits. The Account of a Participant shall [**10] be credited with a Benefit Credit as of the last day of each of the Plan Years in the period beginning with the Plan and ending with the Plan Year in which a Participant's employment with an Employer is terminated. The Benefit Credit shall be equal to the applicable percentage of the Participant's Compensation paid by an Employer during the Plan Year, as determined by the Participant's age and Years of Credited Service as of the end of such Plan Year in accordance with Table 4.1(b) below; provided,

(1) [omitted]

(2) with regard to the Plan Year in which the Participant's employment with an Employer is terminated, (A) the Benefit Credit shall be determined by the Participant's age and Years of Credited Service as of the date of termination, (B) Compensation shall be recognized for this purpose only through such date of termination, and (C) such Benefit Credit shall be made as of the date of termination instead of the last day of such Plan Year.

TABLE 4.1(b)

Benefit Credits Based on Participant's Age and Years of Credited Service

Percentage of Plan Year Compensation Credited to Participant's Account

Participant's age	Less Than 6 Years of Credited Service	At Least 6 But Less Than 11 Years of Credited Service	At Least 11 But Less Than 15 Years of Credited service	15 Years of Credited Service
Up to Age 24	2.0%	2.0%	n/a	n/a
Age 25 to 29	2.5%	2.5%	2.5%	n/a
Age 30 to 34	3.0%	3.0%	3.0%	3.0%
Age 35 to 39	4.0%	4.0%	4.0%	4.0%

Appendix A

Age 40 to 44	4.0%	4.0%	4.0%	4.0%
Age 45 to 49	4.0%	5.0%	6.0%	6.0%
Age 50 and Over	4.0%	5.0%	6.0%	7.0%

[**11]

> [*330] (c) Minimum Benefit Credit. [T]he minimum Benefit Credit each Plan Year . . . for any Participant who is a Full-Time Employee shall be$500....
>
> (d) Interest Credits. The Account of a Participant shall be credited with an Interest Credit as of the last day of each of the Plan Years in the period beginning with the Plan Year next following the date on which a Benefit Credit is first made to a Participant's Account and ending with the Plan Year in which the Participant's Benefit Commencement Date occurs .... [18]

17 *See* Schlein Action.

18 Plan Article 4.1(a)-(d), Ex. 1 to Joint Stips. ("Plan Article 4.1").

Article 4.1(e) establishes the fractional rule as the Plan's mechanism for complying with ERISA's minimum accrual standards:

(e) Minimum Account. Notwithstanding the benefit described in § 4.1(a) above, if the Account at the date a Participant ceases to be eligible to earn Benefit Credits ("Determination Date") has accrued so that the accrual does [**12] not meet the requirements of § 411(b)(1) of the Code and the Treasury regulations issued thereunder, there shall be added to the Account the amount described in paragraph (4) below calculated as follows:

(1) The projected value

("Projected Value") of a Participant's Account is calculated by projecting the Account at the Determination Date to the Participant's Normal Retirement date (using the average Compensation for the Participant, as determined in accordance with *§ 411(b)(1)(A)* of the Code and the Treasury regulations issued thereunder, and the same rate used to calculate Interest Credit ("Interest Rate") as in the year of the Determination Date) assuming for these purposes that the Participant continued to earn Benefits Credits through the Normal Retirement Date.

(2) Determine the minimum

account ("Minimum Account") by multiplying the Projected value by a fraction, the numerator of which is the Participant's Years of Vesting Service and the denominator of which is the Years of Vesting Service plus the number of years and months from the Participant's Determination Date to the Participant's Normal Retirement Date.

(3) Calculate the excess, if any, of the [**13] Minimum Account, over the Account at Determination Date future valued to the Normal Retirement Age of the Participant using the Interest Rate.

(4) Calculate the quotient of the amount determined in paragraph (3) above divided by a present value factor (equal to 1 plus the Interest Rate, the sum of which is raised to a power equal to the number of months divided by 12 from Determination Date to Normal Retirement Date).[19]

19 *Id.* (emphasis added).

2. January 1, 2002 CBA

The 2002 CBA incorporated the same cash balance regime adopted in 2000, but [*331]

recalibrated the range of benefit credits that would be allotted annually to employees' hypothetical accounts. It lowered the floor from 2% to 1.5% of compensation for participants under age twenty-nine in their first five years of credited service. It also lowered the ceiling from 7% to 6% of compensation for participants fifty-five years or older with fifteen or more years of credited service ("2002-Present Benefit Credits"). [20] The application [**14] of the fractional rule under Article 4.1(c) remained unchanged.

20 *See* Joint Stips. PP 24-25.

The first and only communication to Plan participants in 2001 of an amendment pursuant to *ERISA § 204(h)* was an information package dated December 2001. [21] Although different versions of the packages were prepared, they all contained: (i) a cover letter dated December 5, 2001, from Tyrrell Erbes, Citigroup's Director of Retirement Benefits; (ii) a document entitled "Notices to Interested Parties;" and (iii) a document entitled "Citigroup Pension Plan 204(h) Notice." [22] As with the December 1999 § 204(h) notice, there is no mention of the Plan's application of the fractional rule. [23] The named plaintiffs do not recall receiving these packages, nor do they recall being aware in December 2001 that the 2002 CBA "might substantially reduce benefit accruals for themselves or others." [24]

21 *See id.* PP 35-36.

22 December 2001 § 204(h) Packages

(collectively, "December 2001 § 204(h) notices"), Exs. 19-21 to Joint Stips. Exhibits 19, 20, and 21 are different versions of the package that were specifically tailored for, respectively, legacy Citibank employees, legacy Travelers employees and legacy employees of Associates First Capital ("Associates"), a company acquired by Citigroup in 2000.

[**15]

23 *See id.*

24 Joint Stips. P 37. Defendants stipulate that had plaintiffs been aware of the implications of the 2002 CBA, they would have initiated legal action earlier than they did. See id.

III. APPLICABLE LAW

A. Standard of Review

[HN1] Summary judgment is appropriate if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [25] [HN2] An issue of fact is genuine if "the evidence is such that a jury could return a verdict for the nonmoving party." [26] [HN3] A fact is material when it "'might affect the outcome of the suit under the governing law.'"[27] [HN4] The movant has the burden of demonstrating that no genuine issue of material fact exists. [28]

25 *Fed. R. Civ. P. 56(c).*

26 *Anderson v. Liberty Lobby, 477 U.S. 242,*

248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Accord Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 169 (2d Cir. 2006).

27 *Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005) (quoting Anderson, 477 U.S. at 248).*

[**16]

28 *See Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)).*

In turn, [HN5] to defeat a motion for summary judgment, the non-moving party must raise a genuine issue of material fact that does "'not rely on conclusory allegations or unsubstantiated speculation.'" [29] To do so, it must do more than show that there is "'metaphysical doubt as to the material [*332] facts.'"[30] [HN6] In determining whether a genuine issue of material fact exists, the court must construe the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in that party's favor. [31]

29 *Jeffreys, 426 F.3d at 554 (quoting Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 428 (2d Cir. 2002)).*

30 *Woodman v. WWOR-TV, Inc., 411 F.3d 69, 75 (2d Cir. 2005) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).*

[**17]

31 *See Golden Pac. Bancorp v. FDIC, 375 F.3d 196, 201 (2d Cir. 2004).*

B. Statute of Limitations

[HN7] Although ERISA does not prescribe a statute of limitations for civil actions, where parties seek to recover higher benefits from a pension plan, the appropriate statute of limitations is six years -- the limitations period specified in the most analogous state statute. [32] The Second Circuit has held that the six-year statute of limitations does not begin to run until "there has been a repudiation by the fiduciary which is clear and made known to the beneficiaries." [33] Typically, the statute of limitations period begins when a participant's formal application for benefits is denied. [34] In some circumstances, however, the time period may begin earlier. [35]

32 *See Miles v. New York State Teamsters Conference Pension and Ret. Fund, 698 F.2d 593, 598 (2d Cir. 1983)* (holding that because employee benefit plans are contracts, under New York law the applicable statute of limitations is six years) (citing *N.Y. C.P.L.R. § 213).*

33 *Davenport v. Harry N. Abrams, Inc., 249 F.3d 130, 134 (2d Cir. 2001).*

34 *See Lewis v. John Hancock Mut. Life Ins. Co., 6 F. Supp. 2d 244, 247 (S.D.N.Y. 1998).*

35 *See Carey v. International Bhd. of Elec.*

Workers Local 363 Pension Plan, 201 F.3d 44, 49 (2d Cir. 1999) (holding that the statute of limitations may be triggered upon a participant's receipt of a plan amendment or letter).

C. ERISA's Minimum Accrual Rules

[HN8] Although cash balance plans mimic some of the same features of defined contribution plans, in this Circuit they are treated as defined benefit plans. [36] "The regulatory consequences of this [defined benefit plan] classification are wide-reaching." [37] One critical consequence is that the term "accrued benefit" under a cash balance plan means "a participant's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." [38]

36 *See Esden, 229 F.3d at 158.*

[**19]

37 *Id.*

38 *Id. at 163* (citation and quotation marks omitted). By contrast, for defined contribution plans, the term "accrued benefit" is "simply 'the balance of an individual's [hypothetical] account.'" *Id. at 162* (citation omitted).

[HN9] Although ERISA does not require pension plans to pay out a specific dollar amount, it does regulate the rate at which benefits accrue. [39] A paramount reason for [*333] this is to prevent

"backloading," a term of art describing a plan's use of a benefit accrual formula that postpones the bulk of an employee's accrual to her later years of service. Given the time value of money, it is not surprising that plan sponsors are often tempted to backload pension benefits.

> 39 *See* ERISA § 204(b)(1), *29 U.S.C. § 1054(b)(1)*. [HN10] There is significant statutory overlap between ERISA and the Internal Revenue Code ("I.R.C.") on matters such as funding, vesting and benefit accrual. This is because much of Title I of ERISA, codified at Title 29 of the United States Code, was duplicated in Title II, which was codified as amendments to the I.R.C. While the Internal Revenue Service ("IRS") has primary jurisdiction and rule-making authority over these ERISA provisions, "[r]egulations prescribed by the Secretary of the Treasury [under *I.R.C. §§ 410 and 441*] shall also be used to implement the related provisions contained in [ERISA]," and *ERISA § 3002(c)* specifically adopts the regulations promulgated under *I.R.C. §§ 410(a), 411*, and *412. Esden, 229 F.3d at 158.*

[**20] To combat backloading, ERISA requires plans to accrue benefits relatively evenly over the course of an employee's career. [40] ERISA sets forth three alternative tests for monitoring accrual rates; in order to be lawful a plan must satisfy at least one of

these formulas.[41] These formulas are construed as "minimum accrual standards" to the extent that they tether plans to a controlled, steady baseline of benefit accrual. [42] The First alternative is the "3 percent rule."[43] The second alternative, set forth in *ERISA section 204(b)(1)(B)*, is known as the "133 1/3 percent rule" and provides that:

> [HN11] A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes [**21] of this subparagraph--
>
> (i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;
>
> (ii) any change in an accrual rate

> which does not apply to any individual who is or could be a participant in the current year shall be disregarded[;]
>
> (iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and
>
> (iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year. [44]

Thus the 133 1/3 percent rule prevents backloading by constricting the fluctuation of accrual rates from year to year.

> 40 It is well-established that the purpose of *section 204(b)(1)* is to limit the extent of backloading in benefit plans. *See, e.g., Langman v. Laub, 328 F.3d 68, 71 (2d Cir. 2003); McGill at 262; Langbein at 157.*
>
> 41 ERISA § 204(b)(1); *29 U.S.C. § 1054(b)(1). Accord Esden, 229 F.3d at 158-59.* ERISA's vesting rules by themselves offer insufficient protection against backloading. Langbein explains this with a simple hypothetical: "Consider what might happen if the statute prescribed vesting but did not regulate accrual rates. A plan could be designed that would vest

> employees in 100 percent of accrued benefits after five years, thereby complying fully with ERISA's five-year cliff vesting schedule; yet the formula for accruing benefits under the plan could provide that employees accrue no benefits (or very skimpy benefits) over, say, the first twenty years of employment. Thereafter benefits would accrue very rapidly. Under such a plan, an employee would be 100 percent vested after the fifth year in a pension plan with a benefit of nothing . . . [as] 100 percent of nothing is [still] nothing." *Langbein at 157.*

[**22]

42 *See* Plaintiffs' Memorandum in Support of Summary Judgment ("Pl. SJ Mem.") at 3.

43 *See ERISA § 204(b)(1)(A); 29 U.S.C. § 1054(b)(1)(A).* Neither party advocates utilizing this test.

44 *ERISA § 204(b)(1)(B); 29 U.S.C. §1054(b)(1)(B).*

[*334] The third alternative, set forth in *ERISA section 204(b)(1)(C)*, is called the "fractional rule" because it prorates the projected normal retirement benefit over the years of plan participation. [45] [HN12] A plan satisfies the fractional rule

> if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to

> which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date on which any such determination is made (but taking into [**23] account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. [46]

In simpler terms, under the fractional rule, in any given year, benefit accrual is "based upon the assumption that the participant will continue, until normal retirement age, to earn the same rate of compensation that would have been taken into account under the plan had the employee retired in that year."[47]

45 *See ERISA § 204(b)(1)(C); 29 U.S.C. §*

1054(b)(1)(C).
46 *Id.*
47 *McGill at 263.*

D. Unlawful Whipsaws

The "whipsaw" phenomenon is "widely recognized in the practice literature." [48] Whipsaws occur because [**24] in order for cash balance plans to satisfy the interest rate requirements of ERISA and the I.R.C., participants' accrued benefits must not fall below the actuarial equivalents of such benefits.

> [T]his means that: [HN13] (1) the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age; and (2) if the benefit is paid at any other time (*e.g.*, on termination rather than retirement) or in any other form (*e.g.*, a lump sum distribution, instead of annuity) it must be worth at least as much as that annuity. [49]

The actuarial equivalent is determined by projecting the account balance forward to normal retirement age using a plan's prescribed "projection interest rate" [50] and then discounting it back to present value using the applicable statutory interest rate ("discount rate"). [51] "If the plan's projection rate exceeds the [] discount rate, then the present value of the accrued benefit will

exceed the participant's account balance." [52] A "whipsaw" has occurred. If the larger amount is not paid out, an "impermissible forfeiture has occurred in violation of *ERISA § 203(a)* and *I.R.C. § 411(a)(2)* [**25] ." [53]

48 *Esden, 229 F.3d at 159.*

49 *Id. at 163-64.*

50 This rate is different from the variable interest rate used by a plan to determine the interest credit allocated to account balances each year.

51 *See Esden, 229 F.3d at 159.*

52 *Id.*

53 *Id.*

[*335] **E. Adequate § 204(h) Notice**

[HN14] In order "to safeguard benefits that have been promised to employees," Congress enacted notice requirements that forbid plan sponsors to amend "a plan in a way that reduces future benefit accrual without notice to plan participants." [54] Congress predicated the legitimacy of plan amendments on two critically important ERISA provisions. [55] "First, ERISA's anti-cutback rule protects employees' expectations in their accrued benefits" by prohibiting amendments that would decrease "'the accrued benefit of a participant under a plan.'" [56] Second, *ERISA § 204(h)* forbids plan sponsors to amend "a plan in a way that reduces future benefit accrual without [**26] notice to plan participants." [57] Providing adequate

notice is a precondition to the effectiveness of plan amendments. [58] As the Second Circuit recently held, an ERISA amendment "tak[es] place at the moment when employees are properly *informed* of a change . . . in the text of the plan." [59] At all times relevant to the 2000 and 2002 CBAs, *§ 204(h)* stated:

> [HN15] (h) Notice of significant reduction in benefit accruals
>
> (1) A [pension] plan . . . may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than fifteen days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to -- (A) each participant in the plan . . . . [60]

[HN16] Guidelines promulgated by the IRS [61] clarify that § 204(h) notice is required where an amendment is "reasonably expected to change the amount of the future annual benefit commencing at normal retirement age." [62] Specifically, whether an amendment provides for a "significant reduction" in accrual rates under *§ 204(h)* is determined "based [**27] on reasonable expectations taking account the relevant

facts and circumstances [*336] at the time the amendment is adopted." [63] In order to comply, notices may contain "a summary of the amendment, rather than the text of the amendment, if the summary is written in a manner calculated to be understood by the average plan participant." [64]

54 *Frommert v. Conkright, 433 F.3d 254, 263 (2d Cir. 2006).*

55 *See id.*

56 *Id.* (quoting ERISA § 204(g)(1); *29 U.S.C. § 1054(g)(1)).*

57 *Id.*

58 *See, e.g., Hirt v. Equitable Ret. Plan for Employees, Managers and Agents, 441 F. Supp. 2d 516, 531 (S.D.N.Y. 2006)* (citation omitted).

59 *Frommert, 433 F.3d at 262-63* (looking to the "plain meaning" of the term and rejecting defendants' argument that an amendment occurs upon administrators' modification of a plan).

60 *ERISA § 204(h); 29 U.S.C. 1054 § 204(h). Section 204(h)* was amended in 2001. *See* Pub. L. 107-16 § 659(b), 115 Stat. 38 (2001).

61 Temporary regulations were issued in 1995, and final regulations were issued in 1998. *See Temp. Treas. Reg. § 1.411(d)-6T, 60 Fed. Reg. 64,320 (1995); Prop. Treas. Reg. § 54.4980E-1, 60 Fed. Reg. 64,401 (Dec. 15, 1995).* The temporary regulations were applicable for plan amendments adopted on or after December 15, 1995, and effective on or after January 2, 1996,

in order to "assure that the rights of participants in plans subject to *§ 204(h) of ERISA* are protected." *60 Fed. Reg. at 64,402.* After notice and comments, final regulations were issued December 14, 1998, and applied to plan amendments adopted on or after December 12, 1998. *See Treas. Reg. § 1.411(d)-6, 63 Fed. Reg. 68,678 (1998).*

[**28]

62 *63 Fed Reg. 68,681 (1998).*

63 *Id.*

64 *Id. at 68,682.*

F. ERISA's Age-Based Accrual Rules

ERISA's anti-age discrimination provision for defined benefit plans states [HN17] that "[a] defined-benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the *rate of an employee's benefit accrual* is reduced, because of the attainment of any age." [65] Presently, there is a split within this Circuit as to whether cash balance plans violate this provision. Two district courts have held that cash balance plans are age discriminatory, [66] and two have held they are not. [67] For reasons set forth in Part IV.D below, I join in finding that [HN18] cash balance plans unlawfully discriminate on the basis of age.

65 *ERISA § 204(b)(1)(H)(i); 29 U.S.C. § 1054(b)(1)(H)(i)* (emphasis added). The age

discrimination test for defined-contribution plans differs significantly: "A defined-contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age." ERISA § 204(b)(2)(A); *29 U.S.C. § 1054(b)(2)(A).*

[**29]

66 *See Hirt, 441 F. Supp. 2d 516; Laurent v. Price WaterhouseCoopers, LLP, 448 F. Supp. 2d 537 (S.D.N.Y. 2006). Hirt* is now pending before the Second Circuit Court of Appeals (notice of appeal filed Oct. 13, 2006).

67 *See In re J.P. Morgan Chase Cash Balance Litig., No. 06 Civ. 732, 460 F. Supp. 2d 479, 2006 U.S. Dist. LEXIS 79145, 2006 WL 3063424 (S.D.N.Y. Oct. 30, 2006) ("J.P. Morgan"); Richards v. Fleet Boston, 427 F. Supp. 2d 150 (D. Conn. 2006).*

G. Remedial Measures

[HN19] ERISA provides for the civil enforcement of its provisions. Under *section 502(a)(1)(B)*, a participant or beneficiary may bring an action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." [68] The statute further provides that plaintiffs may seek "to enjoin any act or practice

which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions [**30] of this subchapter or the terms of the plan." [69]

68 *ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B).*
69 *ERISA § 502(a)(3); 29 U.S.C. § 1132(a)(3).*

IV. DISCUSSION

A. Statute of Limitations

As a preliminary matter, I find that plaintiffs' claims are timely. [70] For even assuming, arguendo, that the clock began at the earliest plausible moment -- upon plaintiffs' receipt of the December 1999 § 204(h) notice [71] -- this action would still [*337] be timely because it was commenced on February 3, 2005, less than six years from that date.

70 Defendants argue that the Court should apply a three-year statute of limitations. See Defendants' Memorandum of Law in Support of Summary Judgment ("Def. SJ Mem.") at 17-18. In arguing for a three-year time limit, defendants ignore --without attempting to distinguish -- many Second Circuit decisions.
71 *See Carey, 201 F.3d at 47-48* (the limitations period begins upon a clear and known repudiation of the benefits to which participants

were previously entitled); *see also Miles, 698 F.2d at 598.*

[31] B. The Plan's Accrual Formula (Counts I, II,**

1. Application of the Fractional Rule and Impermissible Backloading

The Plan's cash balance formula misapplies the fractional rule in a way that not only fails to guard against backloading -- it enables backloading. The Plan's use of the fractional rule violates *section 204(b)(1)* because as a career average plan, the only applicable accrual test is the 133 1/3 rule. [72] By its very terms, the fractional rule may only be applied to participants with ten or fewer years of service. [73] Defendants argue that the Citigroup cash balance formula does not violate this limitation because "for purpose of applying the fractional test, average compensation is calculated based only on the last ten" years of an employee's service. [74] Under Plan Article 4.1(e), if this calculation reveals that an individual's hypothetical account balance is less than the minimum amount required by *section 204(b)(1)(C) of ERISA*, Citigroup credits the participant the difference. [75] Defendants assert that this supplementary contribution brings accrued pensions into compliance with the minimum benefit required by the fractional rule. [76] However, [**32] this lump-sum contribution, made on the eve of the benefit payout, is inadequate precisely because it permits the backloading that the

fractional rule was designed to prevent. [77]

72 *See Eaton v. Onan Corp., 117 F. Supp. 2d 812, 843 (S.D. Ind. 2000)* (observing that the three percent rule and the fractional rule "pertain only to plans that take into account no more than ten years of service in calculating benefits"); *Register v. PNC Fin. Set-vs. Group, Inc., No. 04 Civ. 6097, 2005 U.S. Dist. LEXIS 29678, 2005 WL 3120268, at *3 (E.D. Pa. Nov. 21, 2005)* ("Since a cash balance plan is calculated using a career pay history, only [the 133 1/3 percent test] is applicable"); *see also McGill at 263* (noting that the "133 1/3 percent rule governs all plans using a career average formula").

73 *See* ERISA § 204(b)(1)(C); *29 U.S.C. § 1054(b)(1)(C); see also Treas. Reg. § 1.411(b)-1(b)* (observing that consistent with the ten year limitation, the fractional rule could be applied "to a benefit based on average compensation").

74 Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment ("Def. Opp. Mem.") at 2-4.

[**33]

75 *See* Plan Article 4.1(e).

76 *See* Def. Opp. Mem. at 3.

77 Defendants' contention that the Secretary of the Treasury has "unequivocally" offered his "express endorsement of the fractional test for career average plans" misinterprets the Treasury Regulations. Def. Opp. Mem. at 2-3.

> *See 26 C.F.R. § 1.411(b)-1(b)(3)(iii)* Ex. (2). Not a single authority cited by defendants in support of the Plan's legality approved of an accrual schedule similar to that prescribed by Plan Article 4.1(e).

The Plan's unorthodox application of the fractional test only upon a participant's separation from service, rather than on a year-by-year basis, ignores the statutory scheme requiring pension plans to *be able* to test compliance with accrual rules "in any given year," or even any given moment. [78] The Citigroup formula also contravenes [*338] the well-acknowledged purpose of the mandatory accrual tests, which is to prevent the backloading of benefits. [79] In applying the fractional rule only once, at the end of an employee's Plan participation, Article 4.1(e) strips [**34] the rule of its functionality because it can no longer "regulate the rate at which benefits may accrue." [80] Without its consistent application, the fractional test is powerless to "prevent [the Plan] from designing accrual schedules that circumvent the vesting rules by providing that the great preponderance of benefits accrues only in the last years of employment." [81] If such applications of the fractional rule were permissible, plans would be free to adopt formulas providing a mere pittance of benefit accrual over, say, the first twenty years of employment, and thereafter have benefits accrue rapidly by tacking on an additional amount, much like the Citigroup Plan does.

78 *Alessi v. Raybestos-Manhattan, 451 U.S. 504, 514, 101 S. Ct. 1895, 68 L. Ed. 2d 402 (1981)* (describing the fractional rule as "essentially a pro rata rule under which in any given year, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age") (emphasis added); *see also Treas. Reg. § 1.411(b)-1(b)* ("The fractional rule operates to prevent back-loading and ensures *a proportional rate of benefit accrual*. It compares the part of the final benefit payable to a participant at any time (for example, accrued benefit) to the normal retirement benefit ....").

[**35]

79 *See Langman, 328 F.3d at 71* (quoting the House Report on ERISA: "The primary purpose of [minimum accrual rates] is to prevent attempts to defeat the objectives of the minimum vesting provisions by providing undue 'backloading,' i.e., by providing inordinately low rates of accrual in the employee's early years of service when he is most likely to leave the firm and by concentrating the accrual of benefits in the employee's later years of service when he is most likely to remain with the firm until retirement." H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4688).

80 *Esden, 229 F.3d at 154.*

81 *Id.*

To the Court's dismay, plaintiffs' characterization of Article 4.1(e) as a novel end-run around ERISA's minimum accrual standards is accurate. [82] Defendants downplay their gutting of the fractional rule as a harmless modification that is permissible because it is not expressly prohibited by statutory text. [83] More accurately, it is a bold and exploitative contortion of the rule. While defendants "do[] not (and cannot) dispute" [**36] that they are bound to comply with ERISA's accrual rules, they have nonetheless "resist[ed] -- and ha[ve] tried to draft around -- [their] consequences." [84] The Court takes Congress' efforts to prevent the backloading of pension benefits quite seriously. The Plan's accrual formula is unlawfully structured to allow for impermissible backloading. Accordingly, summary judgment is granted in plaintiffs' favor on Counts I and III. [85]

82 *See* Pl. SJ Mem. at 8.

83 *See* Def. SJ Mem. at 7.

84 *Esden, 229 F.3d at 159.*

85 Having granted summary judgment for plaintiffs on Counts I and III, I need not engage in a theoretical and mathematically complicated discussion of whether the Plan -- once cured of its unlawful backloading -- produces an impermissible whipsaw. Accordingly, plaintiffs' motion for summary judgment on this issue is denied without prejudice and with leave to renew should it become necessary to do so.

2. Reformation of the Plan to Comply with the

133 1/3 Percent [37] Rule and Avert Whipsaw**

Having found Article 4.1(e)'s use of the fractional rule impermissible, I turn to the Plan's mandatory compliance with the 133 1/3 percent rule. Defendants have stipulated that since January 1, 2002, the accrual formula has not satisfied the 133 1/3 percent rule. [86] In arguing for a reformation of the Plan, plaintiffs request the imposition of an interest credit floor that will [*339] compensate for the backloaded pay credits while averting whipsaw. [87] The Court declines to direct defendants to adopt plaintiffs' reformation proposals, but hereby orders defendants to reform the Plan consistent with the requirements of ERISA, retroactive to January 1, 2000.

86 By virtue of the 30-Year Treasury Bill rates in effect from January 1, 2000 through December 31, 2001, which ranged from 5.12% to 6.63%, the Plan's overall rate of accrual during these years satisfied the 133 1/3 percent rule. *See* Joint Stips. P 49.

87 *See* Pl. SJ Mem. at 11. Plaintiffs would fix this minimum interest rate at twenty-five percent. *See id.* However, defendants' actuary maintains that this percentage would result in enormous windfalls for participants. *See* 9/28/06 Affidavit of Lawrence Sher ("Sher Aff.") PP 4-5.

[**38] **C. Adequate § 204(h) Notice (Count VII)**

Both the December 1999 § 204(h) and December

2000 § 204(h) notices omitted any mention of the benefit formula's unorthodox approach to calculating benefits and monitoring accrual rates. Because it was ultimately revealed that the formula included an unlawful application of the fractional rule, which had the effect of keeping accrual rates below the minimum rate prescribed by statute, defendants' failure to either include or summarize Article 4.1(e) in the notices violated *§ 204(h)*.

> 88 Because I find the December 1999 and the December 2000 § 204(h) notices substantively inadequate, I need not, and do not, reach the issue of whether distribution of the December 2000 § 204(h) notice was procedurally adequate.

Adequate notice is critical to ensure the "meeting of expectations in the context of ERISA." [89] Plaintiffs had every reason to expect that under the new cash balance plan, their pensions would continue to accrue at a rate approved by Congress. It therefore [**39] is immaterial that the December 1999 § 204(h) notice stated in bolded font that the 2000 CBA could result in a reduction of their benefits. Given the material omissions, it remained "insufficiently 'accurate and comprehensive to reasonably apprise [Plan] participants and beneficiaries of their rights." [90] Nor can it be said that the notices "allow[ed] applicable individuals to understand the effect of the plan amendment" because plaintiffs were without fair warning that the formula endangered their right to a

minimum rate of benefit accrual. [91]

89 *Hirt, 441 F. Supp. 2d at 538. Accord Amato v. Western Union International, Inc., 773 F.2d 1402, 1409 (2d Cir. 1985)* ("[T]here can be no doubt that ERISA was enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits ....").

90 *Frommert, 433 F.3d at 267 (quoting 29 U.S.C. § 1022(a)).*

91 *68 Fed. Reg. at 17,283 (1998).* It is also difficult to imagine that the authors of Plan Article 4.1(e) were unaware that it pushed the boundaries of *section 204(b)(1)* compliance. Given the sub-standard accrual rates that resulted and the long delay in publishing the provision in a written Plan document, it is not difficult to infer a nefarious intent behind this particular cash balance plan's design and execution.

[**40] Defendants submit that the notice claims should be dismissed for plaintiffs' failure to show that they suffered any prejudice as a result of the allegedly deficient § 204(h) notices, as required by *Frommert*. [92] Defendants argue that the "only consequence" here was plaintiffs' failure to commence this litigation sooner, which "hardly constitutes prejudice." 93 This argument is unavailing for two reasons. *First*, in *Frommert*, the prejudice issue [*340] arose in the context of tardy notice, not substantively inadequate

notice. [94] Here, because both the December 1999 and December 2000 § 204(h) notices failed to mention the formula's fractional rule application, which kept accrual rates below the statutory minimum, the amendments never took legal effect. *Second*, in *Frommert*, the Second Circuit explicitly rejected the notion that beneficiaries must demonstrate the type of prejudice urged by defendants:

> Contrary to defendants' arguments and the district court's conclusion, the fact that the plaintiffs remained at Xerox's employ does not demonstrate that they suffered no prejudice through the purported adoption [of the challenged amendment] . . . . Imposing (**41] such a requirement that plan participants must show actual prejudice . . . by terminating their employment imposes an unduly harsh burden on dissatisfied plan participants. [95]

Like the plaintiffs in *Frommert*, the plaintiffs here "were deprived of the opportunity to take timely action in response to the purported 'amendment.'" [96] "Such action might have included seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment." [97] Accordingly, summary judgment for plaintiffs is granted with respect to Count VII.

92 *See Frommert, 433 F.3d at 267* (citations

omitted).

93 Def. SJ Mem. at 24-25. Defendants further assert that there was no prejudice because "[n]one of the Plaintiffs are claiming that they would have left their jobs, and none did, upon learning of either of the amendments." *Id.*

94 *See Frommert, 433 F.3d at 267* ("Allowing 'tardy notice' several years after the effective date of an amendment to stand in for the advance notice that is actually required under § 204(h) upends the purpose of the provision by turning 'future benefit accrual' into past accrual.").

[**42]

95 *Id.*

96 *Id. at 266.*

97 *Id.*

D. Age Discrimination (Count IV and V)

98

98 In addition to finding the Plan to be age discriminatory under ERISA, the Citigroup formula is invalid on the alternative grounds set forth in Parts IV.B and C, supra.

Plaintiffs allege that even after the Plan is reformed to cure the ERISA violations alleged in Counts I through III, the overall accrual formula violates ERISA's prohibition on age discrimination because rates of benefitaccrual diminish each year

based on increasing age. [99] I agree, for very much the same reasons explained by this Court in *J.P. Morgan*.[100]

> 99 I make no determination here as to whether the Plan's misapplication of the fractional rule, by itself, resulted in age discriminatory accrual rates (Count IV).
>
> 100 *See J.P. Morgan, 2006 U.S. Dist LEXIS 79145, 2006 WL 3063424, at *4* (concluding that the J.P. Morgan Plan was age discriminatory because "the unambiguous statutory language, as well as ERISA's different regulatory requirements for defined-contribution and defined-benefit plans, compels this result").

[43] 1. ERISA Age-Based Accrual Provisions Are Applicable Before Normal Retirement Age**

Although neither party raised it here, courts are divided on the threshold issue of whether ERISA's age-based accrual provisions apply to all workers, including those younger than sixty-five. [101] [*341] [HN20] *ERISA section 204(b)(1)(H)(i)* prohibits the reduction of an employee's benefit accrual "because of the attainment of *any age*." [102] Despite this broad terminology, some courts have held that the provision does not apply to individuals before they reach normal retirement age. [103] However, because the statutory language "any age" is unambiguous, I respectfully disagree with those courts. [104] As the Supreme Court has directed, "[t]he preeminent canon of statutory

interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there." [105] By its own terms, the ERISA age provision protects individuals of all ages.

101 *Compare Eaton, 117 F. Supp. 2d at 826* (finding that despite the wording of the statute, "[t]here are strong indications in the statutes and the legislative history . . . that Congress did not intend to apply those provisions to the rate of benefit accrual for employees who have not yet reached normal retirement age"), *with Hirt, 441 F. Supp. 2d at 550* (ultimately finding a cash balance plan non-discriminatory but noting that "[t]he application of the age discrimination prohibition contained in *§ 204(b)(1)(H) of ERISA* to workers of all ages is . . . the necessary consequence of the broad language employed by the statute").

[**44]

102 *29 U.S.C. § 1054(b)(1)(H)(i)* (emphasis added).

103 *See, e.g., Tootle v. ARINC, Inc., 222 F.R.D. 88, 92-93 (D. Md. 2004); Engers v. AT&T Corp., 428 F. Supp. 2d 213, 221-22 (D. N.J. 2001); Eaton, 117 F. Supp. 2d at 825-29; see also Campbell v. BankBoston, N.A., 327 F.3d 1, 9 (1st Cir. 2003)* (ruling in dicta that "the ERISA age discrimination provision may not even apply to workers younger than the age of normal retirement").

104 *See Richards, 427 F. Supp. 2d at 158-59* ("The inclusion of the word 'any,' when given its ordinary, common meaning . . . renders this language unambiguous with respect to the question of whether it protects only employees who have reached age 65.") (quotation marks and citation omitted); *Register, 2005 U.S. Dist. LEXIS 29678, 2005 WL 3120268, at *7* ("The [IRS 2002] proposed regulations emphatically reject the first holding in Eaton, that the age discrimination provisions only apply after normal retirement age.").

105 *BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L Ed. 2d 338 (2004)* (internal citation omitted). *Accord Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 329 (2d Cir. 2005)* (citing *BedRoc*).

[**45] **2. Definition of "Rate of Benefit Accrual"**

The crux of the age discrimination issue is the definition of the "rate of an employee's benefit accrual" as it is used in section *204(b)(1)(H)(i) of ERISA*. If the phrase refers to an employee's retirement benefit (output), as plaintiffs contend, then cash balance plans are discriminatory because they afford younger employees higher rates of benefit accrual than their similarly situated older counterparts.[106] However, if the phrase refers to the employer's annual contributions to the hypothetical accounts (inputs), then there is no discrimination.[107] Plaintiffs argue that the relevant "benefit" is the overall benefit an

employee receives upon retirement (*i.e.*, the annuity at normal retirement age). Under this interpretation, in order to avoid age discrimination, the rate at which a participant accumulates her retirement benefit cannot decrease as she ages. Defendants, however, contend that "the presence or absence of age discrimination should be measured based on the change in participant's cash balance account from year to year, rather than the total value of the annual contributions to the account at retirement age." [108] [**46] Under this view, using annual allocations of interest and pay credits as the relevant paradigm, as long as the employer makes ever-increasing contributions to accounts, there is no ERISA violation.[109] Under defendants' reading, the methodology used to detect age discrimination in a cash balance plan -- which is a defined benefit plan --becomes, for all intents and purposes, the [*342] same as that which is prescribed for defined contribution plans.

106 *See* Pl. SJ Mem. at 22-25.

107 *See* Def. SJ Mem. at 10-13.

108 *Id. at 12.*

109 *See Hirt, 441 F. Supp. 2d at 550* ("The compounding of interest, that is, the payment or contribution of interest on prior months' accumulations, make it possible for all participants to be treated equally ....").

I decline defendants' invitation to "seiz[e] on the obvious similarities" between the parallel anti-discrimination provisions governing defined

contribution and defined benefit plans. [110] Although other courts, including the Seventh [**47] Circuit, [111] have treated cash balance plans as defined contribution plans for this purpose, doing so would ignore the plain language of the statute as well as the critical distinctions between the types of plans outlined by the Second Circuit in *Esden*.[112]

110 Def. SJ Mem. at 11.
111 *See Cooper v. IBM Pension Plan and IBM Corp., 457 F.3d 636 (7th Cir. 2006).*
112 *See Esden, 229 F.3d at 158-63.*

Defendants ally themselves with the Seventh Circuit's position, which is that

> [i]nterest is not treated as age discrimination for a defined-contribution plan, and the fact that [the respective] subsections are so close in both function and expression implies that it should not be treated as discriminatory for a defined-benefit plan either. The phrase "benefit accrual" reads most naturally as a reference to what the employer puts in (either in absolute terms or as a rate of change), while the defined phrase "accrued benefit" refers to outputs after compounding. [**48] [113]

Underlying this interpretation is a presumption that Congress wrote "rate of benefit accrual" in one

provision and "allocations to employee's account" in the other, but intended those phrases to say the same thing. Rules of construction preclude me from adopting this view. The simple

> fact is that [HN21] 'accrual,' using its dictionary meaning and in line with the structure of defined benefit plans, refers to what the employee accumulates [], whereas 'allocation,' using its dictionary definition and in line with the structure of defined contribution plans, refers to what an employer puts into the account.[114]

As the Second Circuit has instructed, "[w]hen Congress uses particular language in one section of a statute and different language in another, we presume its word choice was intentional." [115] If Congress had intended for "the rate of an employee's benefit accrual" to mean "the rate at which amounts are allocated to the employee's account," it would have copied those terms from the analogous provision.

113 *Cooper, 457 F.3d at 638-39.*

114 *J.P. Morgan, 2006 U.S. Dist. LEXIS 79145, 2006 WL 3063424, at *5.*

[**49]

115 *United States v. Peterson, 394 F.3d 98, 107 (2d Cir. 2005).*

The other persuasive argument favoring

plaintiffs' interpretation of the statute is ERISA's binary regulatory framework for defined contribution plans and defined benefit plans. This duality exists because defined contribution plans and defined benefit plans make categorically different promises to employees.[116] As a result, the respective anti-discrimination provisions prescribe distinct metrics for detecting discrimination. Specifically, because employees with defined contribution plans are guaranteed employer contributions to retirement accounts but are not guaranteed a retirement benefit, discrimination is better discerned by looking at "the rate at which amounts are allocated to the employee's account." [117] By contrast, because employees with defined benefit plans are guaranteed a retirement benefit ("output"), [*343] the sheer "import of the statutory language" connotes that "'rate of benefit accrual' refers to the outputs from the Plan." [118]

116 *See generally Esden, 229 F.3d at 159-63.* [**50]

117 ERISA § 204 (b)(2)(A); *29 U.S.C. § 1054(b)(2)(A).*

118 *J.P. Morgan, 2006 U.S. Dist. LEXIS 79145, 2006 WL 3063424, at *6* (emphasis added).

A binary regulatory approach was also required because by their very nature, "'[p]rojections' and 'guesswork' are at the heart of defined benefit plans."[119] Effective regulation of such plans necessarily involves monitoring the future value of the overall pension benefit that will be payable at normal

retirement age. This focus on the value of accrued benefits is apparent throughout the statutory scheme. For example, for purposes of testing compliance with ERISA's three accrual rules, the rate at which participants earn their accrued benefit is examined. Similarly, "the rules governing distributions from defined benefit plans are framed in terms of the normal retirement benefit," which explains why distributions in optional forms, such as lump-sum payments, are required to be equal or greater than the actuarial equivalent of such benefit. [120]

119 *Esden, 229 F.3d at 166.* [**51]
120 *Id. at 159.*

Nevertheless, defendants insist that the proper test for age discrimination concerns the present value of the hypothetical accounts, rather than their value at the normal retirement age. If Congress wanted to divorce ERISA's age-based accrual standards from its otherwise consistent approach toward regulating defined benefit plans it could have done so by either using explicit language to that effect or using a single provision to apply to both types of plans. Congress did just this elsewhere in the statutory regime, "unsurprisingly" using one provision where they intended one standard to apply to both defined benefit and defined contribution plans.[121]

121 *J.P. Morgan, 2006 U.S. Dist. LEXIS 79145, 2006 WL 3063424, at *9* (contrasting *29 U.S.C. § 1052(a)(1)(A)*, which enumerates in a single

provision the participation standards applicable to both types of plans, to the dual anti-discrimination provisions of *29 U.S.C. §§ 1054(b)(1) and 1054(b)(2)).*

[**52] Defendants also urge this Court to find that a "mere correlation" exists between reduced rates of accrual and older age, because any reduction in rates of benefit accrual is really a function of the time value of money. While this is a fair statement, it is inaccurate to the extent it assumes that the time value of money and age are mutually exclusive. [122] Under a cash balance plan, employees never receive the amount in their hypothetical accounts as their retirement benefit. Instead, the cash balance in the account must be converted to the age 65 annuity. 123 Because [*344] this actuarial conversion requires knowing an individual's age, cash balance plans are not age neutral.

122 But *see Cooper, 457 F.3d at 642* (stating that "age discrimination" should be separated "from other characteristics that may be correlated with age"). Whereas the cash balance plan at issue in Cooper was facially age neutral, the Citigroup Plan is not, which perhaps makes its age discrimination more readily apparent. And while I credit the Plan's method of including both years of service and age in the pay credit index as an attempt to mitigate the disparity in age-65 annuity values, the record does not reflect that pay credits increase with

age quickly enough to make up the difference. *See* Sher Aff. PP 4, 5.

[**53]

123 *See Esden, 229 F.3d at 164.* Although the Second Circuit did not address an age-discrimination claim, it held in Esden that ERISA requires all distributions from cash balance plans to be the actuarial equivalent of the accrued benefit expressed as an annual benefit payable at retirement age. Applying this rule where an employee chose to collect a lump sum annuity payment before reaching age 65, the court found that she was entitled to receive the present value of her accrued benefit, $1,595.52, as opposed to the smaller amount in her hypothetical account, $1,533.98. *See id.*

The short of it is that because of this conversion to an age 65 annuity, younger workers are credited with more years to accumulate interest on their hypothetical accounts. [124] Therefore, as a matter of plain arithmetic, a greater value is added to a younger employee's account than to an older employee's account. In other words, "for similarly situated workers (same salary and work history), the older worker, by definition, will receive a smaller retirement benefit simply because he is older, [**54] and thus closer to age 65." [125] This problem is exacerbated further by the phenomenon of compound interest: as the same interest rate is applied to participants' ever-increasing principal balances, the rate at which older workers accrue benefits is slower than that of

younger workers. In this light, the rate of contributions to an individual's account is dependent on age.

> 124 *See Esden, 229 F.3d at 170* (holding that "interest adjustments to a hypothetical allocation [i.e. cash balance account] must be provided through normal retirement age, even though the employee terminates employment or commences benefits before that age").
> 125 *J.P. Morgan, 2006 U.S. Dist. LEXIS 79145, 2006 WL 3063424, at *8.*

Defendants proffer several policy arguments that weigh against measuring the rate of benefit accrual as an annuity beginning at normal retirement age. [126] For instance, they argue that such a finding will "discourage employers from guaranteeing a level growth in the value of a pension over time," resulting [**55] in the widespread adoption of defined contribution plans, and also preclude plans like this one from using a variable interest credit rate. [127] While these practical considerations may have merit, the language of *section 204(b)(1)(H)*, this Circuit's holding in Esden, and the construction of ERISA itself compel the conclusion that such plans are age-discriminatory.[128]

> 126 *See* Def. SJ Mem. at 14-15. *See also Tootle, 222 F.R.D. at 94* ("The potential claim of age discrimination arises only by applying a definition for accrued benefits which does not fit

with the way cash balance plans are structured. The more sensible approach is to measure benefit accrual under cash balance plans by examining the rate at which amounts are allocated and the changes over time in an individual's account balance, as the ERISA provisions designed for traditional defined contribution plans would direct."); *Hirt, 441 F. Supp. 2d at 551.*

127 Def. SJ Mem. at 14-15.

128 *See Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)* ([HN22] "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

[**56] This "dispute is not over what a 'better' regulatory regime, more accommodating to the design objectives of cash balance plans might look like." [129] *Esden* fully acknowledged that "the governing statutes [including ERISA] and regulations were developed with traditional final-pay defined benefit plans in mind" and that "they do not always fit in a clear fashion with cash balance plans and they sometimes require outcomes that are in tension with the objectives of those plans." [130] Nevertheless, I must adhere to Esden's classification of cash balance plans as defined benefit plans. I am not "free to pursue [what may indeed be salutary objectives] at the expense of a

textual interpretation ...."[131] Under these circumstances, I [*345] must "'apply the text, not [] improve upon it.'" [132] Thus while this ruling will likely increase the difficulty of designing cash balance plans that comport with ERISA, the proper forum for redress is Congress. [133]

129 *Esden, 229 F.3d at 171.*

130 *Id. at 159.*

131 *Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120, 126, 110 S. Ct. 456, 107 L Ed. 2d 438 (1989).*

[**57]

132 *In re Pennie & Edmonds LLP, 323 F.3d 86, 101 (2d Cir. 2003)* (quoting *Pavelic & LeFlore, 493 U.S. at 126*).

133 *See, e.g.*, The Pension Protection Act of 2006, Pub. L. No. 109-280 § 701(A)(i) (carving out a distinct regulatory scheme for cash balance plans).

V. CONCLUSION

For the reasons discussed above, summary judgment in plaintiffs' favor is granted on Count I for impermissible backloading, Count III for violations of ERISA's minimum accrual tests, Count V for age discrimination, and Count VII for failing to meet statutory notice requirements. Summary judgment for plaintiffs on Count II, alleging whipsaw, is denied without prejudice. Summary judgment for defendants is denied.

Appendix A

Defendants are ordered to reform the Plan to comply with ERISA. Other appropriate remedies have yet to be determined, in relation to the several claims for relief alleged in the Amended Complaint filed September 21, 2005. The parties, by their respective counsel, shall make written submissions by January 16, 2007, addressing the issue of a remedy not inconsistent [**58] with the rulings contained in this Opinion, and shall appear for a conference on January 2, 2007, at 4:30 p.m. The Clerk of Court is directed to close these motions [Nos. 31, 36 and 43 on the Docket Sheet].

SO ORDERED:

Shira A. Scheindlin, U.S.D.J.

Dated: New York, New York

December 11, 2006

APPENDIX B - DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED DECEMBER 19, 2006

LEXSEE 2006 U.S. DIST. LEXIS 92000

In re CITIGROUP PENSION PLAN ERISA LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

MASTER FILE: 05 Civ. 5296 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

241 F.R.D. 172; 2006 U.S. Dist. LEXIS 92000

December 19, 2006, Decided
December 19, 2006, Filed

SUBSEQUENT HISTORY: Motion denied by *In re Citigroup Pension Plan ERISA Litig.*, 2007 U.S. Dist. LEXIS 27004 (S.D.N.Y., Apr. 4, 2007)

PRIOR HISTORY: *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323, 2006 U.S. Dist. LEXIS 89565 (S.D.N.Y., 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: The court previously granted summary judgment in favor of plaintiffs,

current and former employees, on their claims that a cash balance pension plan violated 29 U.S.C.S. §1054(b)(1), (b)(1)(H)(i), and (h) of the Employee Retirement Income Security Act of 1974 (ERISA) and ordered defendants, an employer and an administration committee, to reform the plan to comply with ERISA. Before the court was plaintiffs' motion for class certification.

OVERVIEW: The court previously held that the pension plan unlawfully applied the fractional test for monitoring compliance with accrual rates and that defendants failed to provide proper notice of plan amendments. Pursuant to *Fed. R. Civ. P. 23*, plaintiffs sought certification of a class consisting of all individuals who were participants in the plan at any time during the class period and their beneficiaries and estates. Defendants did not dispute that the proposed class was sufficiently numerous or that there were questions of law common to the proposed class. The court held that the typicality requirement was met because all absent members suffered the same ERISA violations. The adequacy requirement was satisfied because plaintiffs' interests were commensurate with those of the proposed class. The court concluded that the class action could be maintained under *Rule 23(b)(1)(A)*, which addressed inconsistent dispositions, because the class members were entitled to similar forms of relief. The class action could also be maintained under *Rule 23(b)(2)* because even in the absence of possible monetary recovery, reasonable plan participants would bring the suit to compel

reformation of the plan.

OUTCOME: The court granted certification of the proposed class consisting of all individuals who were participants in the plan at any time during the class period, their beneficiaries and estates, and those who were subject to the plan's cash balance formula pursuant to ERISA.

CORE TERMS: class certification, certification, class members, notice, injunctive relief, formula, pension plans, injunctive, monetary, accrual, declaratory relief, proposed class, typicality, pension, class action, monetary relief, citation omitted, beneficiary, fractional, adequacy, prayer, summary judgment, quotation marks, declaratory, equitable, statutory violations, commonality, declaration, retirement, purported

LexisNexis(R) Headnotes

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Accrual

[HN1] Section 204(b)(1) of the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1054(b)(1)*, requires pension plans to adopt one of three alternative accrual rules designed to prevent plans from backloading benefits.

Appendix B

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Participation

[HN2] Section 3(7) of the Employee Retirement Income Security Act of 1974, *29 U.S.C. S. § 1002(7)*, defines a benefit plan "participant" as an employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > General Overview

[HN3] Congress intended the statutory scheme in the Employee Retirement Income Security Act of 1974, *29 U.S.C. S. § 1001* et seq., in conjunction with state law, to afford broad protection.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Standing

[HN4] Plaintiffs have standing to sue if they are within the zone of interests articulated by the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001 et seq.*

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Suits to Recover Plan Benefits

[HN5] Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C. S. § 1132(a)(1)(B)*, provides that a participant or beneficiary of an ERISA plan may bring a civil action to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview
Evidence > Procedural Considerations > Burdens of Proof > General Overview

[HN6] *Fed. R. Civ. P. 23* governs class certification. To be certified, a putative class must first meet all four prerequisites set forth in *Rule 23(a)*. Plaintiffs bear the burden of demonstrating that the class meets these requirements -- commonly referred to as numerosity, commonality, typicality, and adequacy.

Civil Procedure > Class Actions > Prerequisites > Numerosity

[HN7] The numerosity requirement mandates that a class be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*.

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN8] Commonality requires a showing that common issues of fact or law affect all class members. *Fed. R. Civ. P. 23(a)(2).*

Civil Procedure > Class Actions > Prerequisites > Typicality

[HN9] Typicality exists where the named plaintiffs' claims and the absent class members' claims arise from the same course of events, and where each class member makes similar legal arguments to prove a defendant's liability.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation

[HN10] The adequacy requirement demands that the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4).*

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN11] Although *Fed. R. Civ. P. 23(a)* does not expressly require that a class be definite in order to be certified, a requirement that there be an identifiable class has been implied by the courts. This implied requirement is often referred to as ascertainability.

Civil Procedure > Class Actions > Prerequisites > Maintainability

[HN12] In addition to showing that a proposed class

satisfies the four prerequisites of *Fed. R. Civ. P. 23(a)*, plaintiffs must also show that the class is maintainable under *Rule 23(b)*. A class satisfies this requirement if it in fits into one of the three alternative categories delineated by *Rule 23(b)(1), (2)*, and *(3)*. A class may be certified under more than one category.

Civil Procedure > Class Actions > Certification
[HN13] *Fed. R. Civ. P. 23(b)(1)(A)* permits certification where multiple suits could create a possibility of incompatible adjudications or establish incompatible standards to govern a defendant's conduct. *Rule 23(b)(1)(B)* is more specialized; it covers situations where individual actions would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Civil Procedure > Class Actions > Certification
Civil Procedure > Declaratory Judgment Actions > General Overview
Civil Procedure > Remedies > Injunctions > General Overview
[HN14] Under *Fed. R. Civ. P. 23(b)(2)*, class litigation is appropriate where the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. In this context,

declaratory relief corresponds to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief.

Civil Procedure > Class Actions > Certification
Civil Procedure > Declaratory Judgment Actions > General Overview
Civil Procedure > Remedies > Damages > Monetary Damages
Civil Procedure > Remedies > Injunctions > General Overview
[HN15] Although *Fed. R. Civ. P. 23(b)(2)* was designed with an eye towards equitable relief, certification of a class seeking both equitable and monetary relief may be appropriate in light of the relative importance of the remedies sought, given all of the facts and circumstances of the case. In assessing whether *Rule 23(b)(2)* applies, a district court's first inquiry is whether even in the absence of possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought. The court's next inquiry is whether the injunctive or declaratory relief would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.

Civil Procedure > Class Actions > Certification
[HN16] District courts may certify classes only after assessing all the relevant evidence admitted at the class certification stage, and finding that each of the *Fed. R. Civ. P. 23* requirements has been met. Furthermore, such determinations can be made only if

the court resolves factual disputes relevant to each *Rule 23* requirement and finds that whatever underlying facts are relevant to a particular *Rule 23* requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met. A court's obligation to make such determinations is not lessened by overlap between a *Rule 23* requirement and a merits issue -- even where the two are identical. In making this determination, courts should refrain from considering aspects of the merits unrelated to a *Rule 23* requirement.

Civil Procedure > Class Actions > Prerequisites > Typicality

[HN17] Differences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation

[HN18] The adequacy inquiry under *Fed. R. Civ. P. 23(a)(4)* serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members. Courts are required to ask whether a plaintiffs interests are antagonistic to the interest of other members of the class.

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Civil Procedure > Class Actions > General Overview Civil Procedure > Pretrial Matters > Consolidation of Actions

[HN19] Unlike the class action device, consolidation does not merge suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.

Civil Procedure > Class Actions > Certification

[HN20] There is no real litigation significance to whether a court certifies a class under *Fed. R. Civ. P. 23(b)(1)(A)* or *(b)(1)(B)* or both. Certification under either of these two provisions will not trigger any special class provisions in other parts of Rule 23 relating to notice or right of exclusion, and each subdivision will permit class suits seeking injunctive relief or damages or both. Court certification of a class under either *Rule 23(b)(1)(A) or (b)(1)(B)* makes no difference.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Suits to Recover Plan Benefits

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Equitable Relief > Declaratory Relief

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Equitable Relief > Restitution

[HN21] Where a pension plan is found unlawful under the Employee Retirement Income Security Act of 1974,

29 U.S.C.S. § 1001 et seq., a participant's claim to recover benefits is neither restitutionary nor equitable, but it is declaratory.

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JUDGES: Shira A. Scheindlin, U.S.D.J. OPINION BY: Shira A. Scheindlin

OPINION
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OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Michael Lonecke, Raymond Duffy, Anne Nelson, Robert S. Fash and Craig A. Harris, on behalf of themselves and a class of similarly situated individuals ("plaintiffs"), filed consolidated actions

against Citigroup Inc., and its Plans Administration Committee ("defendants"), alleging that the Citibuilder Cash Balance Plan ("Plan") violates the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), *29 U.S.C. § 1001 et seq.* This ruling assumes familiarity with the Court's previous ruling on the parties' cross-motions for summary judgment, which describes the ways in which the Plan's [**2] design and execution violate ERISA.[1] By Opinion and Order, the Court granted summary judgment in plaintiffs' favor on Counts I, III, V and VII of their Consolidated Class Action Amended Complaint ("Complaint"),[2] denied defendants' motion for summary judgment, and directed defendants to reform the Plan to comply with ERISA.

1 *See In re Citigroup Pension Plan ERISA Litig., No. 05 Civ. 5296, 470 F. Supp. 2d 323, 2006 U.S. Dist. LEXIS 89565, 2006 WL 3613691 (S.D.N.Y. Dec. 12, 2006) ("Citigroup I").*

2 Count I of the Complaint alleges that the Plan is impermissibly backloaded in violation of ERISA. *See ERISA § 204(b)(1); 29 U.S.C. § 1054(b)(1).* Count III alleges that the Plan unlawfully applies the fractional test for monitoring compliance with statutorily mandated accrual rates. See id. Count V alleges that the Plan is age-discriminatory in violation of ERISA. *See ERISA § 204(b)(1)(H)(i); 29 U.S.C. § 1054(b)(1)(H)(i).* Count VII alleges that 39 Employee Benefits Cas. (BNA) 2039 defendants failed to provide Plan participants

proper notice of amendments made to the Citigroup Pension Plan in 2000 and 2002, as required by section 204(h) of ERISA, *29 U.S.C. § 1054(h).*

[**3] [*175] In this Opinion, I address plaintiffs' motion for class certification, filed August 25, 2006. For the reasons stated, class certification is granted.

II. BACKGROUND

A. Citigroup's Cash Balance Plan

3

3 For a thorough discussion of how cash balance plans work, see Dan M. McGill, et al., Fundamentals of Private Pensions 262-64 (8th ed. 2005) ("McGill").

Both parties have agreed to all material facts.[4] The named plaintiffs are present or former employees of either Smith Barney or Citibank, N.A., both of which are divisions of Citigroup Inc. ("Citigroup").[5] They all accrued benefits under the Plan during all or part of the period since January 1, 2000 ("class period").[6] Two named plaintiffs were vested participants at the time their employment terminated.[7]

4 *See* Joint Stipulations ("Joint Stips.").
5 *See id.* PP 1-6.

6 *See id.* P 7. The cash balance plan at issue here is one of three pension plans presently comprising the Citigroup Pension Plan. See id. P 8.

[**4]

7 *See id.* P 7.

1. January 1, 2000 Cash Balance Amendment

In a meeting on October 19, 1999, Citigroup's Board of Directors ("the Board") voted to incorporate a "cash balance design" into the Citigroup Pension Plan.[8] At this meeting, the Board did not discuss specific provisions of the newly adopted cash balance amendment ("CBA"), such as how it would calculate benefits. In fact, provisions of the amendment setting forth the Plan's formula in detail were not produced in an executed Citibuilder Retirement Plan document until May 27, 2001.[9]

8 *Id.* P 16. Minutes from the Board meeting statethat the Board adopted a cash balance formula "on substantially the terms as previously presented to the Board," which referred to a presentation on employee benefits given to the Board on March 16, 1999, by Paul J. Collins, Vice Chairman of Citigroup. Minutes of the 10/19/99 Board meeting ("10/19/99 Minutes"), Ex. 4 to Joint Stips. Collins' presentation included a report on how a cash balance formula could be incorporated into the

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Citigroup Pension Plan. Id. Accord Joint Stips. P 16.

[**5]

9 See Joint Stips. P 18; 5/27/01 Action of Senior Human Resources Officer Michael Schlein ("Schlein Action"), Ex. 7 to Joint Stips. The 2000 CBA was also described in a summary plan description dated January 1, 2001, but this document was not made available to employees until June 2001. See Joint Stips. P 18.

However, after the Board's vote, and prior to the CBA's effective date of January 1, 2000, plan participants did receive a summary notice of the new pension formula.[10] This notice was a letter mailed to all effected employees dated December 9, 1999, from Tim Peach, Director of Retirement Benefits.[11] Attached to the letter was a document entitled -- in large boldfaced letters --"The Citigroup Pension Plan Notice of Significant Reduction in Benefit Accruals for Certain Employees of Citigroup Inc. and its Subsidiaries."[12] The document contained an overview of how the cash balance formula would work, as well as a table listing the percentages of salaries that would be credited to accounts annually, based on an employee's age and years of service.[13] Most importantly, the notice [**6] neither included nor summarized Plan Article 4.1(e), which adopts the "fractional rule" as the Plan's mechanism for complying with ERISA's minimum benefit accrual

rates, and is the linchpin of plaintiffs' actuarial claims.[14]

10 *See* 12/9/99 Letter and Attachments from Tim Peach ("December 1999 section 204(h) notice"), Ex. 16 to Joint Stips.

11 *See id.*

12 *Id.* At least one named plaintiff, Lonecke, recalls receiving this notice at his residence in late 1999. See Joint Stips. P 31.

13 *See* December 1999 section 204(h) notice.

14 *See* [HN1] ERISA § 204(b)(1); *29 U.S.C. § 1054(b)(1)* (requiring pension plans to adopt one of three alternative accrual rules designed to prevent plans from backloading benefits).

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2. January 1, 2002 CBA

The 2002 CBA incorporated the same cash balance regime adopted in 2000, but recalibrated the range of benefit credits that would be allotted annually to employees' hypothetical accounts. Specifically, it lowered the [**7] floor from 2% to 1.5% of compensation for participants under age twenty-nine in their first five years of credited service. It also lowered the ceiling from 7% to 6% of compensation for participants fifty-five years or older with fifteen or more years of credited service ("2002-Present Benefit Credits")[15]. The application of the fractional rule under Article 4.1(e) remained unchanged.

15 See Joint Stips. PP 24-25.

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The first and only communication about this amendment to Plan participants which preceded its effective date, January 1, 2002, and which conceivably met statutory notice requirements, was an information package dated December 2001.[16] However, as with the December 1999 section 204(h) notices, there is no mention of the Plan's application of the fractional rule.[17] The named plaintiffs do not recall receiving these packages, nor do they recall being aware in December 2001 that the 2002 CBA "might substantially reduce benefit accruals for themselves or others."[18]

16 *See id.* PP 35-36; ERISA § 204(h); *29 U.S.C. § 1054(h).*

[**8]

17 *See* Joint Stips. PP 35-36.

18 *Id.* P 37. Defendants stipulate that had plaintiffs been aware of the implications of the 2002 CBA, they would have initiated legal action earlier than they did. *See id.*

Plaintiffs filed their Complaint on September 21, 2005, alleging numerous ERISA violations. Their prayer for relief includes injunctive and declaratory relief as well as monetary damages.[19]

19 *See* Complaint PP 32-42, "Prayer For Relief (A)-(F).

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III. APPLICABLE LAW

A. Plan "Participants" Under ERISA

As a preliminary matter, plaintiffs seek certification of a class, pursuant to *Rule 23 of the Federal Rules of Civil Procedure*, consisting of all individuals who were "participants" in the Plan at any time during the class period, "their beneficiaries and Estates, and those who are subject to the Plan's cash balance formula [] pursuant to ERISA. [**9] "[20] [HN2] *Section 3(7) of ERISA* defines a benefit plan "participant" as an

> employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit ... .[21]

[HN3]

"Congress intended the statutory scheme [in ERISA], in conjunction with state law, to afford broad protection."[22] [HN4] Plaintiffs have standing to sue if they are "within the 'zone of interests'" articulated by the statute.[23]

20 Plaintiffs' Motion for Class Certification ("Pl. Mem.") at 1-2.

21 *29 U.S.C. § 1002(7).*

22 *Mullins v. Pfizer, Inc., 23 F.3d 663, 667-68 (2d Cir. 1994)* (concluding it would be unfair to bar plaintiff, who had terminated participation in his pension plan in reliance on misleading statements made by plan administrators, from pursing an ERISA action for fraudulent misrepresentation).

23 *Id.* (citation omitted). *See also* [HN5] ERISA § 502(a)(1)(B); 29 U.S.C. §1132(a)(1)(B) (providing that a participant or beneficiary of an ERISA plan may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan").

[**10] **B. Rule 23(a) Class Certification Requirements**

[HN6] *Rule 23 of the Federal Rules of Civil Procedure* governs class certification. To be certified, a putative class must first meet all four prerequisites set forth in *Rule 23(a).* Plaintiffs bear the burden of demonstrating that the class meets these requirements -- commonly referred to as numerosity, [*177] commonality, typicality, and adequacy.[24] [HN7] The numerosity requirement mandates that the class be "so numerous that joinder of all members is impracticable." [25] [HN8] Commonality requires a

showing that common issues of fact or law affect all class members.[26] [HN9] Typicality exists where the named plaintiffs' claims and the absent class members' claims arise from "the same course of events," and where each class member makes "similar legal arguments" to prove defendant's liability.[27] [HN10] The adequacy requirement demands that "the representative parties will fairly and adequately protect the interests of the class."[28] Finally, [HN11] although "'Rule 23(a) does not expressly require that a class be definite in order to be certified[,] a requirement that there be an identifiable class has been implied by the courts. [**11]"' [29]

24 *See, e.g., Cruz v. Coach Stores, Inc., 202 F.3d 560, 573 (2d Cir. 2000).*

25 *Fed. R. Civ. P. 23(a)(1).*

26 *See Fed. R. Civ. P. 23(a)(2); see also Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198 (S.D.N.Y. 1992).*

27 *Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001) (quoting Marisol A. by Forbes v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997)).*

28 *Fed. R. Civ. P. 23(a)(4).*

29 *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323, 336 (quoting Zapka v. Coca-Cola Co., No. 99 Civ. 8238, 2000 U.S. Dist. LEXIS 16552, 2000 WL 1644539, at *2 (N.D. Ill. Oct. 27, 2000)).* This implied requirement is often referred to as "'ascertainability.'" *Id. (quoting Van West v.*

Midland Nat'l Life Ins. Co., 199 F.R.D. 448, 451 (D.R.I. 2001)).

C. [**12] Rule 23(b) Class Certification Requirements

[HN12] In addition to showing that the proposed class satisfies the four prerequisites of *Rule 23(a)*, plaintiffs must also show that the class is "maintainable"under *Rule 23(b)*. A class satisfies this requirement if it in fits into one of the three alternative categories delineated by *Rule 23(b)*, subdivisions (1), (2), and (3).[30] A class may be certified under more than one category. [31]

30 The named plaintiffs originally moved for class certification pursuant to all three subdivisions of *Rule 23(b)*. By letter to the Court dated 12/12/06, plaintiffs formally requested to withdraw their motion for certification under *Rule 23(b)(3)*; the Court granted this request without prejudice and with leave to replead should it become necessary to do so.

31 *See, e.g., Richards v. Fleetboston Fin. Corp., No. 04 Civ. 1638, 238 F.R.D. 345, 2006 U.S. Dist. LEXIS 77154, 2006 WL 2979373 (D. Conn. Oct. 16, 2006) (granting class certification pursuant to Rule 23(b)(1)(A) and Rule 23(b)(2)).*

[HN13] *Rule 23(b)(1)(A)* [**13] permits certification where multiple suits "could create a possibility of incompatible adjudications" or "establish

incompatible standards to govern [defendants'] conduct."[32] *Rule 23(b)(1)(B)* is more specialized; it covers situations where individual actions "would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." [33]

32 1966 Advisory Committee Note to *Rule 23(b). See Fed. R. Civ. P. 23(b)(1)(A).*
33 *Fed. R. Civ. P. 23(b)(1)(B).*

[HN14] Under *Rule 23(b)(2)*, class litigation is appropriate where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to [**14] the class as a whole." [34] The Advisory Committee Note suggests that in this context, "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." [35]

34 *Fed. R. Civ. P. 23(b)(2).*
35 1966 Advisory Committee Note to *Rule 23(b)(2).*

[HN15] Although *subdivision (b)(2)* was designed with an eye towards equitable relief, certification of a class seeking both equitable and

monetary relief may be appropriate "in light of the relative importance of the remedies sought, given all of the facts and circumstances of the case."[36] The Second Circuit [*178] has instructed that in assessing whether *subdivision (b)(2)* applies, a district court's first inquiry is whether "'even in the absence of possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought.'"[37] The court's next inquiry is whether "'the injunctive or declaratory [**15] relief would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.'" [38]

> 36 *Parker v. Time Warner Cable, 331 F.3d 13, 20 (2d Cir. 2003)* (quotation marks and citation omitted).
> 37 *Id.* (*quoting Robinson, 267 F.3d at 164).*
> 38 *Id.*

D. Standard of Proof

The Second Circuit recently articulated the requisite standard of proof for class certification in *Miles et al. v. Merrill Lynch et al. ("Miles").* [39] [HN16] District courts may now certify classes only after assessing "all the relevant evidence admitted at the class certification stage," and finding that "each of the *Rule 23* requirements has been met." [40] Furthermore,

> such determinations can be made only if the [court] resolves factual disputes relevant to each *Rule 23* requirement and finds that whatever

> underlying facts are relevant to a particular *Rule 23* requirement have been established and is persuaded to rule, based on the relevant facts and the applicable [**16] legal standard, that the requirement is met. [41]

A court's "obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue" -- even where the two are "identical." [42] In making this determination, courts should refrain from considering "aspect[s] of the merits unrelated to a Rule 23 requirement." [43]

> 39 *See F.3d , No. 05-3349-cv, 471 F.3d 24, 2006 U.S. App. LEXIS 29859, 2006 WL 3499937 (2d Cir. Dec. 5, 2006).*
> 40 *2006 U.S. App. LEXIS 29859 [WL] at *15.*
> 41 *Id.*
> 42 *Id.*
> 43 *Id.*

IV. DISCUSSION

A. Rule 23(a)

1. Numerosity and Commonality

Defendants do not dispute that plaintiffs' proposed class is sufficiently numerous under *Rule 23(a)(1)*. Although the exact identity and number of class members remains unknown, the record shows that there are thousands of potential class members.[44]

Nor do defendants dispute that the proposed class meets the commonality requirement of *Rule 23(a)(2)*. Questions of law common to the potential [**17] class include whether the cash balance formula complies with ERISA, whether Plan participants received adequate notice of the 2000 and 2002 CBAs, and whether benefits under the Plan accrue at a rate that discriminates on the basis of age. [45]

44 *See* Pl. Mem. at 7 (noting that mailing lists obtained during discovery identify thousands of Plan participants during the relevant period).
45 *See id.* at 8.

2. Typicality

Because all absent class members were participants of the same cash balance plan and suffered the same ERISA violations the typicality requirement is also satisfied. All named plaintiffs' claims allege ERISA violations that affect the pensions of all Plan participants during the class period. Their claims arise from "'the same course of events'" -- the same unlawful accrual formula -- and each participant makes the same "'legal arguments to prove the defendant[s] liability.'"[46] Although the amount of harm suffered by individual class members depends on several factors, such [**18] as age and length of service, [HN17] "differences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims."[47]

46 *Robinson, 267 F.3d at 155 (quoting Marisol A., 126 F.3d at 376* (typicality exists where plaintiffs' legal arguments are "similar").
47 *Ouellette v. International Paper Co., 86 F.R.D. 476, 480 (D. Vt. 1980) (citing Sanders v. Faraday Labs., Inc., 82 F.R.D. 99, 101 (E.D.N.Y. 1979)* (concluding that "[p]roof of defendant's liability . . . will benefit all members of the proposed classes," and "that the damages, if any, may reach a de minimis level at some point among the class members does not make the named plaintiffs' claims atypical")).

[*179] Defendants allege that plaintiffs have not proved typicality because their claims "hinge on a demonstration of 'likely prejudice,' which will be based on facts and circumstances unique to each . . . purported class member. [**19]"[48] Defendants presented the identical argument in their motion for summary judgment, and it is no more convincing here than it was there.[49] Even assuming that all of plaintiffs' claims require a showing of likely prejudice, plaintiffs have certainly met this requirement. I need not make "individualized assessments into each potential class member's proof and defenses, as the 'likely prejudice' showing [is] satisfied by the terms of the plan itself."[50] The defects in the Plan's accrual formula and in the section 204(h) notices were themselves "significant enough to establish a presumption of likely prejudice," common to all potential class members, and "this presumption has not been rebutted."[51]

48 *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification ("Def. Mem.") at 6-7 (*citing Dunnigan v. Metropolitan Life Ins. Co., 214 F.R.D. 125, 137 (S.D.N.Y. 2003)).*

49 [EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [0> <O] IS OVERSTRUCK IN THE SOURCE.]

See id. (citing Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 24-25). Defendants reassert that plaintiffs have failed to proffer evidence showing that they were harmed by any inadequacies in the section 204(h) notices. However, as I held in my earlier ruling, the record indicates that Plan participants were indeed "deprived of the opportunity to take timely action in response to the purported "amendment[O> ; <O]" adopting the Plan's unlawful application of the fractional rule. *Citigroup I, 2006 U.S. Dist. LEXIS 89565, 2006 WL 3613691, at * 10* (quotation marks and citation omitted). "S[O> [s] <O]uch action might have included seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment." *Id.*

[**20]

50 *Richards, 2006 U.S. Dist. LEXIS 77154, 2006 WL 2979373, at *3.*

51 *Id.* (*citing Frommert v. Conkright, 433 F.3d 254, 267 (2d Cir. 2006)). Accord Piazza v.*

EBSCO Indus., 273 F.3d 1341 (11th Cir. 2001); Petrolito v. Arrow Fin. Servs., LLC, 221 F.R.D. 303, 313 (D. Conn. 2004) (discussing the maintainability of "a (b)(1)(A) ERISA suit involving the application of an ERISA-covered plan to a number of employees").

3. Adequacy

The record demonstrates that plaintiffs' interests are commensurate with those of the proposed class. [52] Defendants argue, without specificity, that adequacy is lacking because "the named Plaintiffs have already conceded facts that preclude them from prevailing on the claims they purport to assert on behalf of the purported class members."[53] This argument appears to be completely baseless as defendants never identify the alleged concessions. In fact, plaintiffs' claims are premised on the same Plan provisions and ineffective section 204(h) notices that give rise to the claims of absent class members, and plaintiffs state [**21] claims to pension benefits to which the potential class members are also entitled. Plaintiffs have clearly satisfied the adequacy requirement.

52 *See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* ([HN18] "The adequacy inquiry under *Fed. R. Civ. P. 23(a)(4)* serves to uncover conflicts of interest between named parties and the class they seek to represent. A class

representative must be part of the class and possess the same interest and suffer the same injury as the class members."); *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 142 (2d Cir. 2001)* (requiring courts to "ask whether plaintiffs interests are antagonistic to the interest of other members of the class") (quotation marks and citation omitted).

53 Def. Mem. at 8. The cases defendants cite in support of this argument are predicated on easily distinguishable facts. *See, e.g., Spann v. AOL Time Warner, Inc., 219 F.R.D. 307 (S.D.N.Y. 2003)* (denying certification where many members of purported class of employees had signed binding releases with varying terms, waiving their right to recover ERISA benefits, thereby subjecting them to unique defenses).

[**22] **B. Class Certification Under Rule 23(b)**

1. Rule 23(b)(1)

The proposed class is well-suited for certification under *Rule 23(b)(1)*. The language of *subdivision (b)(1)(A)*, addressing the risk of "inconsistent adjudications," speaks directly to ERISA suits, because the defendants have a statutory obligation, as well as a fiduciary responsibility, to "treat the members of the class alike."[54] The proposed [*180] class members number in the thousands; they all suffered the same statutory violations and are therefore entitled to similar forms of relief, including reformation of the

Plan to comport with ERISA.

> 54 *Amchem, 521 U.S. at 614* (quotation marks and citation omitted). *Accord Ortiz v. Fibreboard Corp., 527 U.S. 815, 846-47, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999); Richards, 2006 U.S. Dist. LEXIS 77154, 2006 WL 2979373, at *8-9; 2 Newberg on Class Actions § 4.8 at 26 (4th ed. 2002)* ("Newberg") (offering examples of the applicability of *Rule 23(b)(1)(A)* to cases where defendant had a statutory obligation to treat all class members alike).

[**23] In opposition, defendants assert that there is no reason to believe that multiple actions will be brought for these violations in the absence of class certification, or that multiple actions would produce inconsistent results.[55] They argue that in the year that has passed since the commencement of this action, there have been no additional complaints, nor were any previous complaints filed in the five year history of the cash balance plan.[56] However, as other courts have noted, the fact that only a limited number of plaintiffs have come forward can weigh significantly in favor of class certification.[57] Additionally, "[t]he Second Circuit itself, in several opinions . . . has noted that the absence of other lawsuits is meaningless in determining the interest of absent class members in the controversy."[58]

> 55 *See* Def. Mem. at 10-11.
>
> 56 *See id.*
>
> 57 *See Gary Plastic Packaging Corp. v. Merrill*

Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990) ("[T]he fact that Gary Plastic was the only plaintiff to come forward and seek to represent the class weighs in favor of certification ....").

[**24]

58 2 Newberg § 4.6 at 21-22 (*citing Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968)).*

Because the claims here are premised on statutory violations caused by the terms of the Plan, and because plaintiffs seek injunctive relief -- including the retroactive reformation of the Plan and recalculation of benefits --inconsistent dispositions of these claims by different courts "could create an untenable situation."[59] Thus, class certification under *23(b)(1)(A)* is appropriate.

59 *Richards, 2006 U.S. Dist. LEXIS 77154, 2006 WL 2979373, at *9.*

Defendants also argue, unpersuasively, that this Court's previous Consolidation Order weighs against class certification.[60] However, [HN19] unlike the class action device, consolidation "does not merge the suits into a single cause, or change [**25] the rights of the parties, or make those who are parties in one suit parties in another."[61] Although other claimants have not yet come forward, plaintiffs have adequately

alleged that many similarly-situated Plan participants suffered the same statutory violations. In light of my previous ruling, there is little doubt that in the absence of class certification, others would be encouraged to commence litigation.[62]

60 *See* Def. Mem. at 10.

61 *In re Community Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortgage Loan Litig., 418 F.3d 277, 298 (3d Cir. 2005).*

62 Plaintiffs also argue for certification under *Rule 23(b)(1)(B).* See Pl. Mem. at 12-13; Plaintiffs' Reply Memorandum of Law in Further Support of their Motion for Class Certification at 6-7. But the "historical antecedents" of this subdivision suggest that it was designed for "class actions . . . involving, for instance, 'claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, [and] proceeds of a ship sale in a maritime accident suit.'" *Dobson v. Hartford Life & Accident Ins. Co., No. 99 Civ. 2256, 2006 U.S. Dist. LEXIS 14922, 2006 WL 861021, at *7 (D. Conn. Mar. 31, 2006) (quoting Ortiz, 527 U.S. at 834).* Given that the classic cases suitable for *Rule 23(b)(1)(B)* certification are limited fund cases, and that plaintiffs have not established a basis for going beyond this rationale, and because I find certification proper under an alternative subdivision of *Rule 23(b),* I limit certification under *Rule 23(b)(1)* to subdivision (A). *See Ortiz, 527 U.S. at 834; see*

also 2 Newberg § 4.8 at 30 ([HN20] "There is no real litigation significance whether the court certifies the class under *Rule 23(b)(1)(A)* or *(b)(1)(B)* or both. Certification under either of these two provisions will not trigger any special class provisions in other parts of *Rule 23* relating to notice or right of exclusion, and each subdivision will permit class suits seeking injunctive relief or damages or both. Court certification of a class under either *Rule 23(b)(1)(A)* or *(b)(1)(B)* makes no difference.").

[**26] **2. Rule 23(b)(2)**

Class certification here also falls squarely within the purview of *Rule 23(b)(2)*, [*181] because I find that "even in the absence of possible monetary recovery, reasonable [Plan participants] would bring the suit to obtain the injunctive [and] declaratory relief plaintiffs seek.[63] For even if they were somehow precluded from monetary recovery, reasonable Plan participants would bring suit to enjoin the Plan's application of the fractional rule and to compel a reformation of the Plan to comply with ERISA's minimum rates of benefit accrual. Additionally, I find plaintiffs' prayers for relief --including monies prescribed by the recalculation of benefits under a statutorily compliant formula -- to be both reasonably necessary and appropriate "in light of the facts and circumstances of the case."[64] In other words, given the import and necessity of plaintiffs' prayers for declaratory and injunctive relief, they "predominate"

over other prayers for relief under Robinson.[65]

63 *Parker, 331 F.3d at 20* (quotation marks and citation omitted).

64 *Id. Accord Richards v. FleetBoston Fin. Corp., 235 F.R.D. 165, 174 (S. D. N. Y. 2006) (certifying, under Rule 23(b)(2),* a class of plan beneficiaries seeking monetary and injunctive relief for ERISA violations); *Amara v. CIGNA Corp., No. 3: 01 CV2361, 2002 U.S. Dist. LEXIS 25947, 2002 WL 31993224, at *4 (D. Conn. Dec. 20, 2002)* (holding that claims seeking equitable relief under ERISA section 502(a), *29 U.S.C. § 1132(a),* warranted class certification under *23(b)(2)* "because they seek injunctive relief, pursuant to ERISA, generally applicable to the entire class").

[**27]

65 *See 267 F.3d at 164.*

Defendants assert that *Rule 23(b)(2)* certification is unavailable to plaintiffs with respect to certain statutory violations because plaintiffs seek "restitutionary relief" in the form of "the greater of the benefit calculated under the pre-cash balance formula or the cash balance formula."[66] This argument misses the mark because it is well established that a prayer for monetary relief in addition to equitable relief will not defeat a *Rule 23(b)(2)* class action.[67] While it is true that Plan participants are suing to recover benefits, the primary relief being sought is declaratory. Indeed,

> [w]hat is sought is a declaration that [Citigroup's] method of computing [accrued benefits] is unlawful. That is a ground common to all the members of the class . . . . True, the declaration sought and obtained [is] merely a prelude to a request for damages . . . . [b]ut a declaratory judgment is normally a prelude to a request for other relief, whether injunctive or monetary; so there is nothing suspicious about the characterization of the [**28] suit as one for declaratory relief. The hope that motivates casting a request for relief in declaratory terms is that if the declaration is granted, the parties will be able to negotiate the concrete relief necessary to make the plaintiffs whole without further judicial proceedings. No one wants an empty declaration. [68]

Here, because the recalculation and crediting of withheld pension benefits will be "the direct, anticipated consequence" of my previous ruling, the suit can be maintained under *Rule 23(b)(2)*.[69]

> 66 Def. Mem. at 12 (arguing that (b)(2) certification is unavailable on plaintiffs' inadequate section 204(h) notice claims). Defendants' characterization of the monetary relief being sought as "restitutionary" is inaccurate. As Judge Richard Posner recently

observed, [HN21] where a pension plan is found unlawful under ERISA, a participant's claim "to recover benefits" is neither restitutionary nor equitable, "but it is declaratory." *Berger v. Xerox Corp. Ret. Income Guar. Plan, 338 F.3d 755, 763-64 (7th Cir. 2003) (citing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213-14, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002); Honolulu Joint Apprenticeship & Training Comm. v. Foster, 332 F.3d 1234, 1237-38 (9th Cir. 2003)).*

[**29]

67 *See Robinson, 267 F.3d at 164* (holding that certification of a class pursuant to *Rule 23(b)(2)* is appropriate even where a claim seeks both injunctive relief and non-incidental monetary damages); *FleetBoston, 235 F.R.D. at 174* (certifying a class of pension beneficiaries under subdivision(b)(2) in light of the "'relative importance of the remedies sought'") (quoting *Parker, 331 F.3d at 20); see also Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001)* (concluding that in order to not predominate, monetary relief must be "incidental," meaning that "'damages flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief . . . . (*quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)).*

68 *Berger, 338 F.3d at 764.*

69 *Id.* Moreover, it is not uncommon, forpurposes of *(b)(2)* certification, for courts to

treat injunctions requiring the payment of monies unlawfully withheld as injunctive -- rather than monetary -- relief. *See, e.g., Berger, 338 F.3d at 763-64* (holding that pension beneficiaries' suit to recover benefits was maintainable as a class action under *23(b)(2)); FleetBoston, 235 F.R.D. at 174* (certifying a class under *23(b)(2)* where plaintiff sought injunctive and monetary relief on grounds substantially similar to those articulated by the Citigroup plaintiffs); *Walsh v. Northrup-Grumman Corp., 162 F.R.D. 140, 148 (E.D.N.Y. 1995)* (finding that a claim was for injunctive relief, not monetary damages, for *23(b)(2)* purposes, where plaintiffs requested the court to restore them to their positions prior to a merger, including back pay and restitution of benefits).

[* 182]

[**30] **V. CONCLUSION**

For the foregoing reasons, certification of the proposed class is granted pursuant to Rule 23(b)(1)(A) and *(b)(2) of the Federal Rules of Civil Procedure*. The Clerk of Court is directed to close this motion [Docket No. 39]. A conference is scheduled for January 2, 2007, at 4:30 p.m., at which the parties should be prepared to discuss the scope of the class and the possible need for subclasses.

Appendix B

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

December 19, 2006

APPENDIX C - DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED APRIL 4, 2007

LEXSEE 2007 U.S. DIST. LEXIS 27004

In re CITIGROUP PENSION PLAN ERISA LITIGATION; THIS DOCUMENT RELATES TO: CLASS ACTION

MASTER FILE: 05 Civ. 5296 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2007 U.S. Dist. LEXIS 27004

April 4, 2007, Decided
April 4, 2007, Filed

SUBSEQUENT HISTORY: Application granted by *In re Citigroup Pension Plan ERISA Litig., 2007 U.S. Dist. LEXIS 86145 (S.D.N.Y., Nov. 20, 2007)*

PRIOR HISTORY: *In re Citigroup Pension Plan ERISA Litig., 241 F.R.D. 172, 2006 U.S. Dist. LEXIS 92000 (S.D.N.Y., 2006)*

CORE TERMS: final judgment, formula, accrual, certification, interlocutory appeal, citation omitted, difference of opinion, notice, age discrimination,

hardship, summary judgment, immediate appeal, quotation marks, backloading, injustice, quotation, question of law, legal standard, anti-backloading, beneficiaries, prescribed, protracted, impression, fractional, discovery, partial, career, notice requirements, disagreement among, interlocutory

COUNSEL: [*1] For Plaintiffs: Edgar Pauk, Esq., New York, New York; Brad N. Friedman, Esq., Milberg Weiss Bershad & Schulman, LLP, New York, New York; William D. Frumkin, Esq., Sapir & Frumkin LLP, White Plains, New York; Richard S. Schiffrin, Esq., Joseph H. Meltzer, Esq., Edward W. Ciolko, Esq., Schiffrin & Barroway, LLP, Radnor, Pennsylvania.

For Defendants: Myron Rumeld, Esq., Proskauer Rose LLP, New York, New York.

JUDGES: Shira A. Scheindlin, U.S.D.J.

OPINION BY: Shira A. Scheindlin

OPINION

MEMORANDUM OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Michael Lonecke, Raymond Duffy, Anne Nelson,

Appendix C

Robert S. Fash and Craig A. Harris, on behalf of themselves and a class of similarly situated individuals, filed consolidated actions alleging that the Citibuilder Cash Balance Plan ("Plan") violates the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), *29 U.S.C. § 1001 et seq.*, seeking injunctive and declaratory relief as well as monetary damages.[1] By Opinion and Order dated December 11, 2006, this Court denied summary judgment for defendants and granted summary judgment for plaintiffs with respect to three major |*2| legal issues raised in their Complaint.[2] Specifically, the Court ruled that (1) the Plan's unorthodox formula violated ERISA's anti-backloading rules and kept accrual rates below the minimum rate prescribed by statute; (2) the Plan was impermissibly age discriminatory under ERISA; and (3) defendants failed to meet statutory notice requirements with respect to amendments made to the Plan in 2000 and 2002.[3] The Court also directed defendants to reform the Plan to comply with ERISA.[4]

1 *See* Complaint PP 32-42, "Prayer for Relief" (A)-(F).

2 *See In re Citigroup Pension Plan ERISA Litig., 470 F. Supp. 2d 323, 2006 U.S. Dist. LEXIS 89565, 2006 WL 3613691 (S.D.N.Y. 2006) ("Citigroup I").*

3 *See id.*

4 *See id.* at *14.

By Opinion and Order dated December 19, 2006, this Court certified a class of plaintiffs consisting of all

individuals who were participants in the Plan at any time on or after January 1, 2000, their beneficiaries and estates, and those who are currently subject to the Plan's [*3] cash balance formula under ERISA.[5] Defendants now move for partial final judgment on the age discrimination and backloading issues pursuant to *Federal Rule of Civil Procedure 54(b)*, leave to file an interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*, and for a stay of this Court's rulings pending appellate proceedings in both this case and another case currently on appeal to the Second Circuit.[6] For the reasons stated below, all of defendants' motions are denied. The Court also takes this opportunity to clarify its prior summary judgment ruling with respect to plaintiffs' notice claims under ERISA § 204(h).[7]

5 *See In re Citigroup Pension Plan ERISA Litig., No. 05 Civ. 5296, 241 F.R.D. 172, 2006 U.S. Dist. LEXIS 92000, 2006 WL 3770504, at *2 (S.D.N.Y. Dec. 19, 2006) ("Citigroup II").* Defendants petitioned the Second Circuit for appellate review of this Court's class certification ruling pursuant to *Federal Rule of Civil Procedure 23(f)*; their petition was denied. *In re Citigroup Pension Plan ERISA Litig., No. 07-0070-MV (2d Cir. Jan. 4, 2007).*

6 *See* Memorandum of Law in Support of Defendants' Motion for Partial Final Judgment Pursuant to *Rule 54(b)* and Certification Under *28 U.S.C. § 1292(b)* and for a Stay ("Def. Mem.") at 1 (requesting a stay until the Second Circuit

rules in *Hirt v. Equitable Ret. Plan for Employees, Managers & Agents, 441 F. Supp. 2d 516 (S.D.N.Y. 2006), appeal pending, No. 06 Civ. 4757 (filed Oct. 13, 2006).*

7For a discussion of cash balance plans, generally, and the factual background of this litigation, *see Citigroup I, 470 F. Supp. 2d 323, 2006 U.S. Dist. LEXIS 89565, 2006 WL 3613691, at *1-4.*

II. LEGAL STANDARD

A. Final Judgments Under Rule 54(b)

Rule 54(b) states, in relevant part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of a judgment. [8]

The Second Circuit [*5] has provided the following guidance in deciding whether to certify a final judgment under *Rule 54(b)*:

> Generally, a district court may

> properly make a finding that there is no just reason for delay only when there exists some danger or hardship or injustice through delay which would be alleviated by immediate appeal, for example, where a plaintiff might be prejudiced by a delay in recovering a monetary award, or where an expensive and duplicative trial could be avoided if, without delaying the prosecution of the surviving claims, a dismissed claim were reversed in time to be tried with the other claims. The district court's explanation as to why a disposition should be appealable immediately is entitled to substantial deference, and we thus review it for abuse of discretion.[9]

The Second Circuit has also emphasized that "[r]espect for the historic federal policy against piecemeal appeals requires that a *Rule 54(b)* certification not be granted routinely."[10] The power should be "exercised sparingly,"[11] and reserved for "the infrequent harsh case" [12] where the aforementioned dangers of hardship or injustice exist.

8 *Fed. R. Civ. P. 54(b).*

9 *Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 16 (2d Cir. 1997). See also Ginett v. Computer Task Group, Inc., 962 F.2d 1085, 1095 (2d Cir. 1992)* ("The proper guiding star . . . is the interest of sound judicial

administration." (quotation marks omitted)).
10 *Grand River Enters. Six Nations Ltd. v. Pryor, 425 F.3d 158, 165 (2d Cir. 2005) (citing Citizens Accord, Inc. v. Town of Rochester, 235 F.3d 126, 128-29 (2d Cir. 2000)).*
11 *Advanced Magnetics, 106 F.3d at 16.*
12 *Grand River Enters., 425 F.3d at 165* (citation omitted).

B. Interlocutory Appeals Under Section 1292(b)

Appeals of interlocutory district court orders are governed by *28 U.S.C. § 1292(b).* Under *section 1292(b)*, the order being appealed must "(1) involve a controlling question of law (2) over which there is substantial ground for difference of opinion," and the movant must also show that "(3) an immediate appeal would materially advance the ultimate termination [*7] of the litigation."[13] "[I]n practice the courts treat the statutory criteria as a unitary requirement, and the decisions granting and discussing interlocutory appeals under [section] 1292(b) uniformly cite all three of the elements as being present in any particular case." [14]

13 *28 U.S.C. § 1292(b).*
14 *Estevez-Yalcin v. Children's Vill., No. 01 Civ. 8784, 2006 U.S. Dist. LEXIS 85792, 2006 WL 3420833, at *1 (S.D.N.Y. Nov. 27, 2006)* (quotation marks and citation omitted).

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In addition, leave to appeal is warranted only when the movant demonstrates the existence of "exceptional circumstances" [15] sufficient to overcome the "general aversion to piecemeal litigation" [16] and to "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." [17] Interlocutory appeal "is limited to 'extraordinary cases where appellate review might avoid protracted and expensive litigation,' . . . and is not intended as a vehicle to provide early review [*8] of difficult rulings in hard cases." [18] The decision whether to grant an interlocutory appeal from a district court order lies within the district court's discretion. [19]

15 *Williston v. Eggleston, 410 F. Supp. 2d 274, 276 (S.D.N.Y. 2006).*

16 *In re AroChem Corp., 176 F.3d 610, 619 (2d Cir. 1999). Accord Ted Lapidus, S.A. v. Vann, 112 F.3d 91, 95 (2d Cir. 1997).*

17 *In re Flor, 79 F.3d 281, 284 (2d Cir. 1996)* (quotation marks and citations omitted).

18 *In re Levine, No. 03 Civ. 7146, 2004 U.S. Dist. LEXIS 6025, 2004 WL 764709, at *2 (S.D.N.Y. Apr. 9, 2004) (quoting German v. Federal Home Loan Mortgage Corp., 896 F. Supp. 1385, 1398 (S.D.N.Y. 1995)).*

19 *See, e.g., Swint v. Chambers County Comm'n, 514 U.S. 35, 47, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)* ("district courts [have] first line discretion to allow interlocutory appeals"); *In re Kassover, 343 F.3d 91, 94 (2d Cir. 2003); DM*

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*Rothman Co. v. Cohen Mktg. Int'l, Inc., No. 98 Civ. 7905, 2006 U.S. Dist. LEXIS 52073, 2006 WL 2128064, at *1 (S.D.N.Y. July 27, 2006).*

[*9] "In regard to the first prong, the 'question of law' must refer to a 'pure' question of law that the reviewing court could decide quickly and cleanly without having to study the record." [20] The question must also be "controlling" in the sense that reversal of the district court's order would terminate the action, or at a minimum that determination of the issue on appeal would materially affect the litigation's outcome.[21]

20 *In re WorldCom, Inc., No. M47, 2003 U.S. Dist. LEXIS 11160, 2003 WL 21498904, at *10 (S.D.N.Y. June 30, 2003).*

21 *See In re XO Commc'ns, Inc., No. 03 Civ. 1898, 2004 U.S. Dist. LEXIS 2879, 2004 WL 360437, at *3 (S.D.N.V.. Feb. 26, 2004); North Fork Bank v. Abelson, 207 B.R. 382, 389-90 (E.D.N.Y. 1997).*

As to the second prong, the "substantial ground for a difference of opinion" must arise out of a genuine doubt as to whether the district court applied the correct legal standard in its order. [22] The requirement that such a substantial ground exists may be met when "(1) there is conflicting [*10] authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." [23] However, it is not sufficient that the relevant case law is "less than

clear" or allegedly "not in accord," [24] or that there is a "strong disagreement among the parties." [25] "A mere claim that a district court's decision was incorrect does not suffice to establish substantial ground for a difference of opinion." [26] Rather, the district court must "analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is substantial ground for dispute." [27]

22 *In re Worldcom, 2003 U.S. Dist. LEXIS 11160, 2003 WL 21498904, at *10* (citation omitted).

23 *In re Lloyd's Am. Trust Funds Litig., No. 96 Civ. 1262, 1997 U.S. Dist. LEXIS 11937, 1997 WL 458739, at *5 (S.D.N.Y. Aug. 12,1997)* (*citing Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990)).*

24 *North Fork Bank, 207 B.R. at 390.*

25 *Statutory Comm. of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC), Nos. 99-45005, 01-02952, M47, 2003 U.S. Dist. LEXIS 11119, 2003 WL 21507196, at *1 (S.D.N.Y. June 30, 2003)* (stating that to demonstrate that there is a substantial ground for difference of opinion a party "must show that the issue is difficult and of first impression and involves more than just a strong disagreement among the parties") (quotation omitted).

26 *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Ams., 426 F. Supp. 2d 125, 2005 WL 3440701, at *2 (S.D.N.Y. 2005)* (citations

omitted).

27 *In re Flor, 79 F.3d at 284* (quotation omitted). *Accord Marlin v. United States Tr., 333 B.R. 14, 20 (W. D. N. Y. 2005).*

Finally, "'[a]n immediate appeal is considered to advance the ultimate termination of the litigation if that appeal promises to advance the time for trial or shorten the time required for trial.'" [28] Courts place particular emphasis on the importance of this last factor.[29]

28 *Transportation Workers Union of Am., Local 100, AFL-CIO v. New York City Transit Auth., 358 F. Supp. 2d 347, 350 (S.D.N.Y. 2005) (quoting In re Oxford Health Plans, Inc., 182 F.R.D. 51, 53 (S.D.N.Y. 1998)).*

29 *See Koehler v. Bank of Bermuda, Ltd., 101 F.3d 863, 865-66 (2d Cir. 1996)* ("The use of *§1292(b)* is reserved for those cases where an intermediate appeal may avoid protracted litigation."); *Lerner v. Millenco, L.P., 23 F. Supp. 2d 345, 347 (S.D.N.Y. 1998)* ("The Court of Appeals has emphasized the importance of the third consideration in determining the propriety of an interlocutory appeal.").

[*12] **III. DISCUSSION**

Appendix C

A. Rule 54(b) Partial Final Judgment

Principles of sound judicial administration do not favor the entry of a final judgment under *Rule 54(b)*. In arguing for a final judgment, defendants gloss over the fact that *Rule 54(b)* final judgments are disfavored in this Circuit. Buried in their brief, defendants acknowledge that such judgments are suitable where "'there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal,'"[30] but overall, their submissions are devoid of support for a finding that such a danger exists here. The only "hardships" and/or "injustices" defendants assert are that if a remedial pension plan is proposed and approved before the Second Circuit has an opportunity to rule definitively on the backloading and age discrimination issues, the parties and the Court will have "needlessly" expended resources devising and evaluating potential reforms to the Plan. [31] These hardly constitute the requisite, rare hardships required for final judgments under *Rule 54(b)*.

30 Def. Mem. at 12 (quoting *Cullen, 811 F.2d at 711* (quotation marks and citation omitted)). [*13]

31 *Id. See also id.* at 8 (arguing that having the Court "perform a complicated evaluation of the fairness of a Plan reform proposal," while elements of that proposal are "vulnerable" to appellate review, "is not an efficient use of judicial resources"). Notwithstanding plaintiffs'

opposition, defendants also claim that a final judgment and stay are in Plan participants' best interest. *See id.* at 5-6, 12 (arguing that "until it is clear how these issues finally play out," defendants remain unable to "give Plan participants and beneficiaries reliable advice about their pension benefits" or to devise an accrual formula that would ostensibly maximize participants' benefits). I cannot find that plaintiffs would indeed be better served by the granting of a stay, over the vehement opposition of their own class counsel.

The age discrimination and backloading issues also lack the degree of finality required for a final judgment under *Rule 54(b)*, because only liability has been adjudicated and there had been no final remedy determination on any claim. As noted above, this Court specifically directed [*14] the parties to file remedy plans,[32] and the parties are currently on track to complete all briefing on the remedy issues by May 25, 2007.[33]

32 *See Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978)* (where a district court grants summary judgment as to liability, but "specifically reserves" "consideration of further relief," its judgment lacks the degree of finality required for certification under *Rule 54(b)) (citing Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976))*.

33 *See* 1/16/07 Letter to the Court from Brad N.

Friedman, counsel for plaintiffs. Pursuant to an agreement between the parties, defendants produced discovery data on the remedy issues to the plaintiffs on February 12, 2007. See 2/12/07 Letter to the Court from Myron D. Rumeld, counsel for defendants, to Edgar Pauk, counsel for plaintiffs (enclosing discovery).

B. Section 1292(b) Certification

I am not persuaded that this case presents the "exceptional circumstances" justifying section 1292(b) [*15] certification.[34] With respect to the backloading issue, defendants' arguments in favor of certification are without merit. Defendants do not cite a single case suggesting that any difference of opinion exists -- let alone a substantial one -- as to whether the Plan's application of the fractional test indeed violates ERISA's anti-backloading rules. [35]

34 *In re Flor, 79 F.3d at 284* (quotation marks and citations omitted).

35 *See* Def. Mem. at 16-17. Dicta in a recent Third Circuit case supports this Court's analysis that cash balance plans calculated using a career average formula must apply the 133 1/3% test in order to comply with statutorially mandated minimum accrual rates. *See Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 70 (3d Cir. 2007)* (noting that the only accrual test that can apply to a cash balance plan that uses career pay history is the 133

1/3% test).

Similarly, with respect to the age discrimination issue, I am not of the view that contrary [*16] decisions, even by two circuit courts,[36] constitute the rare case of a substantial difference of opinion justifying interlocutory appeal.[37] Nor would allowing section *1292(b)* certification on this issue avoid protracted litigation in this case, for independent of the age discrimination issue, a reformation of the Plan to comply with Congressionally prescribed minimum rates of benefit accrual (*i.e.*, with the 133 1/3% rule) must proceed without delay.

36 *See Register, 477 F.3d at 68-70; Cooper v. IBM Pers. Pension Plan, 457 F.3d 636 (7th Cir. 2006).*

37 *See In re Flor, 79 F.3d at 284* ("[T]he mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion."). *See also Citigroup I, 470 F. Supp. 2d 323; 2006 U.S. Dist. LEXIS 89565, 2006 WL 3613691, at *7, 10-13* (discussing the split among federal courts on this issue). Two other courts in this Circuit have also considered, and denied, requests to grant section *1292(b)* certification on similar cash balance plan age discrimination issues. *See Richards v. FleetBoston Fin. Corp., No. 03 Civ. 1638, 2006 U.S. Dist. LEXIS 77150, 2006 WL 3000768 (D. Conn. Oct. 16, 2006); In re J.P.*

Morgan Chase Cash Balance Litig., No. 06 Civ. 732, Doc. No. 66 (S.D.N.Y. Nov. 13, 2006) (endorsed letter denying request for interlocutory appeal).

[*17] C. This Court's Prior Ruling on Plaintiffs' ERISA § 204(h) Claims [38]

38 For a discussion of the legal standard governing claims arising under *ERISA § 204(h), see Citigroup I, 470 F. Supp. 2d 323; 2006 U.S. Dist. LEXIS 89565, 2006 WL 3613691, at *6-7.*

With respect to the Plan's compliance with ERISA's notice requirements, I previously ruled that, "because both the December 1999 and December 2000 *§ 204(h)* notices failed to mention the formula's fractional rule application, which kept accrual rates below the statutory minimum, the amendments never took legal effect."[39] In retrospect, this language is ambiguous and requires clarification. The Citigroup Plan presented the Court with an unusual set of facts (unprecedented, as far as this Court is aware) in that it involved a cash balance plan predicated on a career average formula that circumvented ERISA's anti-backloading rules by applying the fractional test instead of the 133 1/3% test. Because the only applicable test for such a plan is the 133 1/3% test, the Plan's accrual formula [*18] was a radical departure from what participants had every reason to expect of their new cash balance formula. As the Court indicated in its December 11 ruling, this egregious defect was

not merely a "technical flaw"[40] - it was a deliberate end-run around statutory guidelines that effectively kept the Plan's accrual rates below the minimum prescribed by Congress.[41]

39 *Id. at *10.*

40 Brief Amicus Curiae of The American Benefits Council in Support of Defendants' Petition for Permission to Appeal Pursuant to *Federal Rule of Civil Procedure 23(f)* at 3, *In re Citigroup Pension Plan ERISA Litigation, petition for appeal denied, No. 07-0070-MV (2d Cir. Jan. 4, 2007)* ("Benefits Brief") (characterizing the Plan's noncompliance with minimum accrual rates as a technicality).

41 *See Citigroup I, 470 F. Supp. 2d 323; 2006 U.S. Dist. LEXIS 89565, 2006 WL 3613691, at *9* (explaining that the notices at issue were inaccurate and also failed to provide Plan participants or beneficiaries with an opportunity to understand the effect of the upcoming amendments (quotations and citations omitted)).

[*19] It has been suggested that the Court's ruling stands for the proposition that any post-amendment discovery of a cash balance formula's technical defect will render the § 204(h) notices of that amendment per se defective. [42] This reading is overly broad. Insofar as the Court's ruling suggests that the § 204(h) notices were required to describe how the amendments were going to reduce rates of benefit

accrual, their lack of detail was of secondary importance to their material omission of an unorthodox yet vital component of the Plan's formula. Suffice it to say here, with benefit of hindsight, that had the notices merely identified the Plan's novel compliance mechanism, those few words would likely have been adequate. [43]

42 *See* Benefits Brief at 2-7.

43 The Court expresses no opinion on whether the addition of such language would satisfy current law.

V. CONCLUSION

For the reasons stated above, defendants' motion is denied. The Clerk of Court is directed to close all pending motions [Docket [*20] Nos. 67, 69].

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

April 4, 2007

APPENDIX D - DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED NOVEMBER 20, 2007

LEXSEE 2007 U.S. DIST. LEXIS 86145

In re CITIGROUP PENSION PLAN ERISA LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

MASTER FILE: 05 Civ. 5296 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2007 U.S. Dist. LEXIS 86145

November 20, 2007, Decided
November 20, 2007, Filed

PRIOR HISTORY: *In re Citigroup Pension Plan ERISA Litig., 2007 U.S. Dist. LEXIS 27004 (S.D.N.Y., Apr. 4, 2007)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, on behalf of themselves and a class of similarly situated individuals, filed consolidated actions against defendants, a corporation and its plans administration committee, alleging that defendants' cash balance plan

(plan) violated the Employee Retirement Income Security Act of 1974 (ERISA), as amended, *29 U.S.C. S. § 1001 et seq.* Now pending was plaintiffs' application requiring defendants to undertake certain remedial remedies.

OVERVIEW: Plaintiffs specifically claimed that the plan was impermissibly backloaded due to insufficient interest credits, that the plan's method of computing was precluded under ERISA, that the plan discriminated based on age, and that defendants failed to provide plan participants with proper notice. The court had previously granted summary judgment for plaintiffs, denied defendants' motion for summary judgment, and directed defendants to reform the plan to comply with ERISA. The court first held that the plan violated the 133 1/3% Rule, which was explained in *29 U.S.C. S. § 1054(b)(1)(B)*. Because of this violation, the court ordered defendants to increase pay credits as required. The court also found that cash benefit plans such as the plan violated *29 U.S.C. S. § 1054(b)(1)(H)(i)*. However, because other courts disagreed as to whether cash benefit plans discriminated based on age in violation of ERISA, the court reserved its ruling on a remedy for this issue. Finally, the court held that because plan participants did not receive fair notice in accordance with *29 U.S.C.S. § 1054(h)*, the court ordered that the plan retroactively reform the accrual system to comply with the 133 1/3% Rule.

OUTCOME: The court directed defendants to reform the plan in accordance with the court's rulings. The parties were to confer to determine how to notify class members of the rulings and the pending ruling regarding plaintiffs' age discrimination claim. One of the court's rulings was that the plan violated the 133 1/3% Rule. As a result, defendants were ordered to increase pay credits to comply with the Rule.

CORE TERMS: notice, accrual, interest rate, benefit plan, summary judgment, accrued benefits, present value, accrue, projection, whipsaw, retirement, exits, age discrimination, discriminate, fractional, nominal, plan participants, equitable relief, consolidated, cross-motions, fails to comply, amount sufficient, proper remedy, future benefit, nominal value, actual value, older worker, legal effect, actuarial, projected

LexisNexis(R) Headnotes

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > General Overview
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Equitable Relief > General Overview
[HN1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. S. § 1132(a)(3), permits any participant, beneficiary, or fiduciary to bring a civil action (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief

(i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. This section does not require district courts to grant particular relief; rather, it affords district courts the discretion to fashion appropriate equitable relief.

Pensions & Benefits Law > Employee Benefit Plans > Cash Balance Plans
Pensions & Benefits Law > Employee Benefit Plans > Defined Benefit Plans
[HN2] A cash balance plan is classified in the Second Circuit as a defined benefit plan for Employee Retirement Income Security Act of 1974 (ERISA), as amended, *29 U.S.C. S. § 1001 et seq.*, purposes. ERISA requires defined benefit plans to accrue benefits at a certain rate, and it provides three tests for determining whether benefit accrual is permissible. *29 U.S.C. S. § 1054(b)(1)(B).* Under the 133 1/3% Rule, a plan generally must provide that in no year may the participant accrue benefits that exceed 133 1/3% of the benefits accrued in any previous year. *29 U.S.C. S. § 1054(b)(1)(B).*

Pensions & Benefits Law > Employee Benefit Plans > Cash Balance Plans
[HN3] The Employee Retirement Income Security Act of 1974 (ERISA), as amended, *29 U.S.C. S. § 1001 et seq.*, requires that a participant's accrued benefits under a cash balance plan not fall below the actuarial equivalent o the participant's account. Thus, a participant's accrued benefits are valued in terms of the annuity that those benefits would yield at

retirement age. If a participant receives that benefit earlier or in another form, the received benefit must be at least as valuable as that annuity. ERISA provides that the actuarial equivalent is determined by projecting the participant's account balance forward using the plan's stated projection interest rate and then discounting that number back to its present value using a statutory interest rate. This provision ensures that where a plan offers an interest rate higher than the statutory rate, a participant who exits the plan before retirement benefits from that higher rate. Therefore, because the interest rate at which the account is projected forward is not necessarily the same as the rate used to discount the future sum back to its present value, the present value of an accrued benefit is not necessarily the same as the nominal dollar value of the benefit. If the projection interest rate exceeds the statutory interest rate, the actual value of an accrued benefit will exceed its nominal value.

Pensions & Benefits Law > Employee Benefit Plans > Cash Balance Plans

[HN4] If a cash value plan awards participants the nominal value instead of the actual value, it violates the Employee Retirement Income Security Act of 1974, as amended, *29 U.S. C. S. § 1001 et seq.*

Appendix D

Pensions & Benefits Law > Employee Benefit Plans > Cash Balance Plans
Pensions & Benefits Law > Employee Benefit Plans > Defined Benefit Plans
[HN5] The Employee Retirement Income Security Act of 1974, as amended, *29 U.S.C. S. § 1001 et seq.*, requires that a defined benefit plan not reduce the rate of an employee's benefit accrual because of the attainment of any age. *29 U.S.C. S. § 1054(b)(1)(H)(i).* Cash benefit plans violate this rule. Under a cash benefit plan, a participant's account is credited with a certain sum each year. The account also benefits from interest that accrues at a certain rate each year. Because a younger worker benefits from more time to earn interest than an older worker, an annual contribution is worth more to the younger worker than the equivalent contribution made to the older worker.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Plan Amendment
[HN6] A plan cannot be amended in a way that reduces future benefit accruals without notice to plan participants. *29 U.S.C.S. § 1054(h).* Amendments to an Employee Retirement Income Security Act of 1974, as amended, *29 U.S.C.S. § 1001 et seq.*, plan become effective at the moment when employees are properly informed of the amendment.

COUNSEL: [*1] For Plaintiffs: Edgar Pauk, Esq., New York, New York; Brad N. Friedman, Esq., Milberg Weiss Bershad & Schulman, LLP, New York, New York; William D. Frumkin, Esq., Sapir & Frumkin

LLP, White Plains, New York; Richard S. Schiffrin, Esq., Joseph H. Meltzer, Esq., Edward W. Ciolko, Esq., Schiffrin & Barroway, LLP, Radnor, Pennsylvania.

For Defendants: Myron Rumeld, Esq., Proskauer Rose LLP, New York, New York.

JUDGES: Shira A. Scheindlin, U.S.D.J.

OPINION BY: Shira A. Scheindlin

OPINION

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Michael Lonecke, Raymond Duffy, Anne Nelson, Robert S. Fash, and Craig A. Harris, on behalf of themselves and a class of similarly situated individuals ("plaintiffs"), filed consolidated actions against Citigroup Inc. and its Plans Administration Committee ("defendants") alleging that the Citibuilder Cash Balance Plan (the "Plan") violates the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), *29 U.S.C. § 1001 et seq.* This ruling assumes familiarity with the Court's previous ruling on the parties' cross-motions for summary judgment.[1] By Opinion and Order, the Court granted summary judgment in plaintiffs' favor on Counts I, III, V, and

VII of their Consolidated [*2] Class Action Amended Complaint ("Complaint"), denied defendants' motion for summary judgment, and directed defendants to reform the Plan to comply with ERISA. This Court also granted plaintiffs' motion for class certification. [2] On April 4, 2007, this Court denied defendants leave for an interlocutory appeal and clarified certain aspects of its summary judgment ruling.[3] Now pending before the Court is plaintiffs' application requiring defendants to undertake certain remedial remedies.

1 *See In re Citigroup Pension Plan ERISA Litig., 470 F. Supp. 2d 323 (S.D.N.Y. 2006) ("Citigroup I").*

2 *See In re Citigroup Pension Plan ERISA Litig., 241 F.R.D. 172 (S.D.N.Y. 2006).*

3 *In re Citigroup Pension Plan ERISA Litig., No. 05 Civ. 5296, 2007 U.S. Dist. LEXIS 27004, 2007 WL 1074912 (S.D.N.Y. Apr. 4, 2007) ("Citigroup II").*

II. BACKGROUND

Plaintiffs claim that the Plan fails to comply with ERISA's minimum accrual requirements. Article 4.1 (e) of the Plan provides that if a payout fails to comply with ERISA's accrual requirements, an additional amount sufficient to satisfy ERISA's "fractional test" would be paid.[4] Participants in the Plan were notified in December 1999 (the "December 1999 § 204 Notice") that there would be changes [*3] in the Plan, but the mechanism underlying Article 4.1(e)

was not explained. A subsequent notice was sent in December 2000 (the "December 2000 § 204 Notice," and collectively, the "Notices"), but this notice also failed to explain Article 4.1(e).

4 *See* Plan Article 4.1 (e), Ex. 1 to Joint Stips.

Plaintiffs allege in Counts I and II, respectively, that the Plan is impermissibly backloaded due to insufficient interest credits and that even if this backloading is cured, the Plan will produce an illegal accrual phenomenon known as a "whipsaw." In Count III, plaintiffs allege that the Plan's "fractional test" method of computing accrued benefits is precluded under ERISA and, in the alternative, the test is being wrongfully applied. In Counts IV and V, plaintiffs allege that the Plan discriminates based on age. Count VI has been withdrawn. In Count VII, Plaintiffs allege that defendants failed to provide Plan participants proper notice that the 2000 and 2002 cash balance amendments ("CBAs") would reduce the rate of future benefit accrual.

On August 25, 2006, the parties filed cross-motions for summary judgment on all counts. On December 11, 2006, this Court held that the Plan violated the requirements [*4] of *section 204(b)(1) of ERISA* and therefore granted plaintiffs' motion with regard to Counts I and III. This Court also held that the Notices failed to satisfy ERISA's notice requirements in that they did not describe the non-traditional method of complying with ERISA's

accrual requirements contained in Article 4.1(e), and therefore granted plaintiffs' motion with regard to Count VII. Finally, this Court held that the Plan was age discriminatory and therefore granted plaintiffs' motion with regard to Count V.

III. APPLICABLE LAW

A. Standard of Review

[HN1] *Section 502(a)(3) of ERISA* permits any participant, beneficiary, or fiduciary to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan ... ." [5] This section "does not require district courts to grant particular relief; rather, it affords district courts the discretion to fashion appropriate equitable relief...." [6]

5 *29 U.S.C. § 1132(a)(3).*

6 *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund, 320 F.3d 151, 161 (2d Cir. 2003).*

B. [*5] Violations of the 133 1/3% Rule (Counts I, III)

As discussed in *Citigroup I*, the Plan is [HN2] a cash balance plan, which is classified in this circuit as a defined benefit plan for ERISA purposes. [7] ERISA

requires defined benefit plans to accrue benefits at a certain rate, and while it provides three tests for determining whether benefit accrual is permissible, only one of those tests, the 133 1/3% Rule, is applicable to the Plan. [8] Under the 133 1/3% Rule, a plan generally must provide that in no year may the participant accrue benefits that exceed 133 1/3% of the benefits accrued in any previous year. [9]

7 *See Citigroup I, 470 F. Supp. 2d at 332.*
8 *See id. at 337; 29 U.S.C. § 1054(b)(1)(B).*
9 *ERISA § 204(b)(1)(B); 29 U.S.C. § 1054(b)(1)(B).*

C. Whipsaws

[HN3] ERISA requires that a participant's accrued benefits under a cash balance plan not fall below the actuarial equivalent of the participant's account. [10] Thus, a participant's accrued benefits are valued in terms of the annuity that those benefits would yield at retirement age. If a participant receives that benefit earlier or in another form, the received benefit must be at least as valuable as that annuity. [11] ERISA provides that the actuarial equivalent [*6] is determined by projecting the participant's account balance forward using the plan's stated "projection interest rate" and then discounting that number back to its present value using a statutory interest rate. [12]

10 *See Citigroup I, 470 F. Supp. 2d at 334-35.*
11 *See Esden, 229 F.3d 154, 163-64.*

12 *See id. at 159.* This provision ensures that where a plan offers an interest rate higher than the statutory rate, a participant who exits the plan before retirement benefits from that higher rate.

Therefore, because the interest rate at which the account is projected forward is not necessarily the same as the rate used to discount the future sum back to its present value, the present value of an accrued benefit is not necessarily the same as the nominal dollar value of the benefit. If the projection interest rate exceeds the statutory interest rate, the actual value of an accrued benefit will exceed its nominal value. [HN4] If such a plan awards participants the nominal value instead of the actual value, it violates ERISA. [13]

13 For example, assuming a 10% projection rate, a 8% statutory interest rate, and annual compounding, a $ 1000 nominal benefit has a present value of $ 1096.09 if the participant [*7] is sixty years old. This discrepancy arises because the $ 1000 is projected forward at a 10% rate for five years, to $ 1610.51, and then discounted at an 8% rate for five years, to $ 1096.09. If the participant exits the plan and receives only the nominal benefit, the participant has been illegally deprived of $ 96.09. This phenomenon is known as a "whipsaw." Of course, if the projection rate were the same as the statutory interest rate, the

present value would be $ 1000.

D. Age Discrimination (Count V)

[HN5] ERISA requires that a defined benefit plan not reduce the "rate of an employee's benefit accrual . . . because of the attainment of any age." [14] In *Citigroup I*, this Court found that cash benefit plans violate this rule.[15] Under a cash benefit plan, a participant's account is credited with a certain sum each year. The account also benefits from interest that accrues at a certain rate each year. Because a younger worker benefits from more time to earn interest than an older worker, an annual contribution is worth more to the younger worker than the equivalent contribution made to the older worker.

14 *ERISA § 204(b)(1)(H)(I), 29 U.S.C. § 1054(b)(1)(H)(i)*
15 *Citigroup I, 470 F. Supp. 2d at 340-45.*

E. [*8] Ineffective Notice (Count VII)

[HN6] A plan cannot be amended "in a way that reduces future benefit accruals without notice to plan participants."[16] The Second Circuit has explained that amendments to an ERISA plan become effective "at the moment when employees are properly informed" of the amendment. [17] In Citigroup I, this Court ruled that the Notices "never took legal effect" to the extent that they failed to disclose Article 4.1(e), which was an atypical and unanticipated method for addressing

ERISA's minimum accrual rules. [18]

16 *Frommert v. Conkright, 433 F.3d 254, 263 (2d Cir. 2006). See also ERISA § 204(h), 29 U.S.C. § 1054(h).*
17 *Frommert, 433 F.3d at 262-63.*
18 *Citigroup I, 470 F. Supp. 2d at 340.*

IV. DISCUSSION

A. Remedy for Minimum Accrual Violations

As discussed in *Citigroup I*, the Plan violates the 133 1/3% Rule. [19] Plaintiffs and defendants agree that the proper remedy for the Plan's violation of the 133 1/3% Rule is the increase of payment credits as necessary to bring the Plan in compliance with the rule. [20] This proposal best ensures that participants in the Plan receive the benefits to which they are entitled. As a result, this Court orders defendants to increase pay credits as [*9] required. [21] To avoid further violation of ERISA, the Plan must make additional payments as required to avoid whipsaws.

19 *Id.* at 337-38.
20 *See* Plaintiffs' Submission Regarding Remedies ("Pl. Sub."), at 2; Defendants' Memorandum Concerning Appropriate Equitable Remedies, at 13.
21 *See* Table Regarding Increases in Benefit Accrual, Ex. B to Pl. Sub.
Article 4.1 (e) of the Plan provides that if a

participant exits the Plan and the accrual would otherwise violate ERISA's accrual restrictions, the participant is entitled to an additional amount sufficient to bring the payment into compliance with ERISA's fractional rule. [22] Plaintiffs argue that the Court should award additional amounts to those participants who would have received them under Article 4.1(e) had the Court not ordered reformation of the plan. [23] However, by its terms, Article 4.1(e) only operates when a participant would otherwise receive a sum insufficient to satisfy ERISA's minimum accrual requirements. [24] Because the Court now orders that the Plan be reformed such that it complies with those requirements, all participants will now receive payments that satisfy ERISA. As a result, Article 4.1 (c) is now irrelevant. [25] Any further [*10] award would be a punitive measure that would violate both the intention and the language of that Article.

22 *See* Plan Article 4.1 (e), Ex. 1 to Joint Stipulations.

23 *See* Pl. Sub. at 4.

24 Plan Article 4.1 (e).

25 In *Citigroup I*, I held that Article 4.1 (e) never took effect because participants did not receive adequate notice of its addition to the plan. *Citigroup I, 470 F. Supp. 2d at 339-40.* However, ERISA provides that in the case of an "egregious failure" to provide adequate notice of an amendment, participants are entitled to receive the greater of what they would have received with and without the amendment. *See*

ERISA § 204(h)(6), 29 U.S.C. § 1054(h)(6). This provision became effective on June 7, 2001, but plaintiffs argue that it was "implicit" before that date. *See* Pl. Sub. at 11 n.8. Because I find that plan participants are not entitled to any additional amounts under Article 4.1(e) even if it were effective, I need not determine whether plaintiffs' construction of the pre-June 7, 2001 statute is correct.

B. Remedy for Notice Violations

This Court held that the 2000 and 2002 CBAs "never took legal effect" to the extent that they included the atypical benefit accrual system described [*11] in Article 4.1(e). [26] Because participants did not receive fair notice of the unorthodox (and illegal) approach taken by that article and by the Plan, they had no reason to expect that their benefits would not accrue in accordance with ERISA's requirements. Plan participants rightfully expected that their benefits would accrue in accordance with the 133 1/3% Rule, and the Notices did not inform them otherwise.

26 *Citigroup I, 470 F. Supp. 2d at 340.*

As discussed above, the Court now orders that the Plan retroactively reform the accrual system to comply with the 133 1/3% Rule. Therefore, because of the required reform, no further remedy is required.

Appendix D

C. Remedy for Age Discrimination Violations

This Court found that cash benefit plans such as the Plan discriminate based on age in violation of ERISA. [27] Defendants argue that retroactive relief on this count is inappropriate because it would impose a severe burden on the Plan, it is unnecessary to ensure future compliance with ERISA, and its action appeared reasonable at the time.

27 *Id. at 343-44.*

I note that several courts have disagreed with this Court's holding that cash benefit plans discriminate based on age in violation of ERISA. [28] Indeed, [* 12] this issue is currently on appeal before the Second Circuit. [29] In light of this pending appeal, and in the interests of judicial economy, I reserve my rulings on the proper remedy (if any) for the Plan's violation of ERISA's ban on age discrimination.

28 *See Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56 (3d Cir. 2007); Drutis v. Rand McNally & Co., 499 F.3d 608, 2007 WL 2409762 (6th Cir. Aug. 27, 2007); In re J.P. Morgan Chase Cash Balance Litig., 460 F. Supp. 2d 479, 2006 WL 3063424 (S.D.N.Y. Oct. 30, 2006); Richards v. FleetBoston, 427 F. Supp. 2d 150(D. Conn. 2006).*

29 *See Hirt v. Equitable Retirement Plan for Employees, Managers and Agents, 441 F. Supp. 2d 516 (S.D.N.Y. 2006), appeal docketed, No. 06 Civ. 4757 (2d Cir. 2006).*

V. CONCLUSION

Defendants are hereby directed to reform the Plan in accordance with this Court's rulings. The parties shall confer to determine how best to notify class members of this ruling and the pending ruling regarding plaintiffs' age discrimination claim, the expense of which shall be borne by defendants. [30] The parties shall determine whether different notices are appropriate for current and former Plan participants. Communications from defendants [*13] to members of the plaintiff class that concern this lawsuit shall be submitted to this Court for approval, on notice to plaintiffs' counsel. This Court will direct further relief when and if appropriate, A conference is scheduled for Friday, December 7, 2007. at 4:30pm.

30 Plaintiffs' counsel has suggested that a paycheck insert might be an appropriate method of notification.

SO ORDERED:

/s/ Shira A. Scheindlin

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

November 20, 2007

APPENDIX E - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 19, 2009

MICHAEL LONECKE, RAYMOND DUFFY, ANNE NELSON, ROBERT S. FASH, AND CRAIG A. HARRIS, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED, Plaintiffs-Appellees-Cross-Appellants, WILLIAM WOODWARD, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED, Plaintiff-Appellee, v. CITIGROUP PENSION PLAN, PLANS ADMINISTRATION COMMITTEE OF CITIGROUP, INC., CITIGROUP, INC., Defendants-Appellants-Cross-Appellees.

Nos. 08-0459-cv, 08-0538-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

584 F.3d 457; 2009 U.S. App. LEXIS 22878

March 20, 2009, Argued
October 19, 2009, Decided

COUNSEL: Edgar Pauk, Law Office of Edgar Pauk, Esq., Brooklyn, New York, and Brad Nelson Friedman, Milberg LLP, New York, New York, for Plaintiffs-Appellees-Cross-Appellants.

Derek W. Loeser, Keller Rohrback LLP, Seattle, Washington, for Plaintiff-Appellee.

Appendix E

Myron D. Rumeld, Proskauer Rose LLP, New York, New York; Lewis R. Clayton, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, New York, for Defendants-Appellants-Cross-Appellees.

JUDGES: Before: JACOBS, Chief Judge, WESLEY, Circuit Judge, and CROTTY*, District Judge.

* The Honorable Paul A. Crotty, United States District Judge for the Southern District of New York, sitting by designation.

OPINION BY: WESLEY

OPINION

WESLEY, Circuit Judge.

Plaintiffs are five present or former employees of either Smith Barney or Citibank, N.A., both of which are divisions of Citigroup, Inc. ("Citigroup"). Plaintiffs, and the class they represent, allege that the Citibuilder Cash Balance Plan ("Plan") violates the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* Plaintiffs seek injunctive and declaratory relief as well as monetary damages.

By order dated December 11, 2006, the United States District Court for the Southern District of New York (Scheindlin, J.) granted partial summary judgment to Plaintiffs on various grounds, including: first, that the Plan violated ERISA's minimum benefit

accrual rules through its use of the "fractional rule"; and second, that Citigroup violated ERISA's § 204(h) notice requirement. 29 U.S.C. § 1054(h). Citigroup challenges those two conclusions. Plaintiffs cross-appeal, raising a number of issues. On appeal, both parties agree that the district court erred in concluding that the "fractional rule" can never properly be applied to cash balance plans, such as Citigroup's Plan. Because we find that Citigroup's Plan does not violate ERISA's minimum benefit accrual rules, and that Citigroup did not violate ERISA's § 204(h) notice requirements, we reverse.

1 The district court also concluded that the structure of the Plan violated ERISA's age discrimination rules. However, subsequent to the district court's opinion in this case, a panel of this court held that "cash balance . . .plans do not by definition violate ERISA's prohibition against age-based reductions in the rate of benefit accrual." *Hirt v. Equitable Ret. Plan for Employees, Managers & Agents*, 533 F.3d 102, 110 (2d Cir. 2008). The age discrimination count, therefore, is not part of this appeal.

I. BACKGROUND

A. ERISA Benefit Plans Generally

ERISA recognizes two basic types of retirement plans: defined contribution plans and defined benefit plans. *Hirt v. Equitable Ret. Plan for Employees,*

Managers & Agents, 533 F.3d 102, 104 (2d Cir. 2008). Defined contribution plans, also known as individual account plans, "guarantee only that the employer will contribute [a certain amount] to the [employee's retirement] account," without providing any guarantee as to that account's value upon the employee's retirement. *Id.* at 105; *see also* 29 U.S.C. § 1002(34). A defined contribution plan is a "pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses." 29 U.S.C. § 1002(34). Both the employee and the employer may contribute to a defined contribution plan, but the employer's contribution is fixed. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999).

2 A 401(k) plan is a common defined contribution plan. *See Hirt*, 533 F3d at 104; *see also* 29 U.S.C. § 1002(34).

Defined benefit plans "generally guarantee [employees] a specific benefit [upon retirement] without regard to how the market performs." *Hirt*, 533 F.3d at 105; *see also* 29 U.S.C. § 1002(35). In contrast to a defined contribution plan, a defined benefit plan "consists of a general pool of assets rather than individual dedicated accounts." *Hughes Aircraft Co.*, 525 U.S. at 439. The pool of assets "may be funded by employer or employee contributions, or a combination of both." *Id.* In a defined benefit plan, "no plan

member has a claim to any particular asset that composes a part of the plan's general asset pool." *Id.* at 440. Rather, members have a right to a defined level of benefits, known as accrued benefits. *Id.* In a defined benefit plan, an accrued benefit is "expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. §1002(23)(A). Whereas, in a defined contribution plan, the accrued benefit is understood as "the balance of the individual's account." 29 U.S.C. § 1002(23)(B).

Defined contribution and defined benefit plans primarily "differ in who bears the risk of investment performance." *Hirt*, 533 F.3d at 105. In a defined contribution plan, the employee bears the risks, while in a defined benefit plan, "the employer typically bears the entire investment risk." *Hughes Aircraft Co.*, 525 U.S. at 439. In a defined benefit plan, the employer is obligated to "cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Id.* And, if a defined benefit plan is overfunded, the employer "may reduce or suspend [its] contributions." *Id.* at 440.

Within the context of these two types of retirement plans, employers have developed a relatively new kind of plan called a "cash balance plan." *Hirt*, 533 F.3d at 105. The cash balance plan is "intended to combine attributes of both defined contribution and defined benefit plans." *Id.* "[C]ash balance plans are often described as 'hybrid': they create a benefit structure that simulates that of

defined contribution plans, but employers do not deposit funds in actual individual accounts, and employers, not employees, bear the market risks." *Id.* Cash balance plans are considered defined benefit plans under ERISA because the accounts are hypothetical in nature and the employee receives a specified lump-sum payout upon retirement. *Esden v. Bank of Boston*, 229 F.3d 154, 158 (2d Cir. 2000); *see also* 29 U.S.C. §1002(35). As a result of this classification, the term "accrued benefit" in a cash balance plan is "expressed in the form of an annual benefit commencing at normal retirement age." *Esden*, 229 F.3d at 163 (quoting 29 U.S.C. § 1002(23)(A).

3 In 2006, Congress enacted the Pension Protection Act ("PPA"), which amended ERISA to allow specifically for cash balance defined benefit plans. Pub. L. No. 109-280, § 701(a)(1), 120 Stat. 780, 981 (2006). The amendment applies to periods commencing on or after June 29, 2005. *Id.*; § 701(e)(1), 120 Stat. at 991. Because Plaintiffs' challenge to the Citibuilder Cash Balance Plan concerns a period prior to the PPA's effective date, the terms of the PPA are not implicated by this appeal. In any event, as we have held, "[e]ven prior to the PPA, cash balance plans could survive scrutiny under ERISA." *Hirt*, 533 F.3d at 104.

When an employer establishes a cash balance plan, an account is created in the name of each participant to keep track of his or her accrued benefits.

Appendix E

Bilello v. JPMorgan Chase Ret. Plan ___ F. Supp. 2d ___, No. 08-cv-7379 (DLC), 2009 U.S. Dist. LEXIS 71080, 2009 WL 2461005, at *1 (S.D.N.Y. Aug. 12, 2009). In a cash balance plan, the account contains "pay credits," which "represent[] a percentage of the participant's salary that is periodically deposited into the account, as well as 'interest credits,' which apply a common interest rate to the account balances." *Id.* Pay credits only accumulate until the termination of the participant's employment, but interest credits continue to accrue until the benefits are distributed. *Id.* In a cash balance plan, the employer may offer the employee the option of a lump sum payout instead of an annuity; however, "any such payout must be worth at least as much, in present terms, as the annuity payable at normal retirement age." *Id.*

Proponents of cash balance pension plans assert that this "hybrid" structure is beneficial for employees because it is easier for them to understand, it allows greater portability, it establishes a system whereby benefits accrue more evenly over an employee's career, and it is "therefore[] better suited to the increased job-mobility of contemporary labor markets." *Esden*, 229 F.3d at 158 n.5.

Advocates of cash balance plans also maintain that they benefit employers. They suggest that "because employees better appreciate the value of their pension rights, the employer's fringe benefit dollar has greater impact." *Id.* They also argue that a cash balance plan "retains the funding advantages of a

defined benefit plan" for the employer. *Id.* Specifically, "actual contributions are made to a single trust fund, based on actuarial assumptions; therefore . . . the employer retains funding flexibility as long as the solvency of the plan is maintained;" and investment returns that exceed "the promised interest credits (as well as forfeitures of the non-vested benefits of any terminated participants)" are retained by the employer. *Id.* Almost one-third of all single-employer defined benefit plan participants – approximately ten million workers – are covered by cash balance plans, or other similar hybrid plans.

B. The Citigroup Plan

In 1998, Citicorp merged with Travelers Corporation. Authority to amend Citibank's pension plan was vested in the plan sponsor, Citigroup, by action of its Board of Directors. In 1999, at a meeting of the Board of Directors, Citigroup converted its traditional, final pay pension formula into a cash balance plan. The Citigroup Board adopted a series of resolutions in October of 1999 incorporating the cash balance design into the Plan. The conversion had an effective date of January 1, 2000.

In May of 2001, the provisions of the newly adopted cash balance plan were set forth in Plan Article 4.1. Under the Plan, Citigroup created a hypothetical account for each participating employee, and then "credited" each account with two kinds of deposits" – Benefit Credits and Interest Credits.

Appendix E

Benefit Credits were awarded to participants a percentage of that year's total compensation. Under the Plan's formula, Benefit Credits increased with age and years of service, ranging from two percent for participants under age twenty-five in their first ten years of service, to seven percent for participants fifty years or older with fifteen or more years of service. Interest credited to the account was awarded based on an extrinsic index rate – the thirty-year Treasury rate. At retirement, participants would be entitled to a lump sum payout based on the accumulated value of their accounts, or to an actuarially equivalent pension.

Although the provisions of the amendments were not set forth in an executed Citibuilder Retirement Plan document until May of 2001, in the months leading p to the effective date Citigroup sent out a number of brochures and pamphlets concerning the changes to the structure of the benefit plan. Pursuant to ERISA § 204(h), official notice of the amendment was given to all Plan participants in a letter from Tim Peach, Director of Retirement Benefits, dated December 9, 1999. The letter was entitled: "The Citigroup Pension Plan Notice of Significant Reduction in Benefit Accruals for Certain Employees of Citigroup Inc. and its Subsidiaries" (the "1999 Notice").

The 1999 Notice contained a general summary of how the new cash balance plan would work, as well as a table listing the percentages of salaries credited to accounts annually, as determined by an employee's age

and years of service. The cover letter referenced ERISA § 204(h) and explained that, due to the forthcoming amendments to the pension plan, it was "likely that some employees would see some level of reduction in total accumulations in the future." The documentation accompanying the letter, distributed to each affected employee, also outlined the mechanisms of a cash balance plan. It explained that under the Plan as amended, the "company credits a percentage of your total compensation each year to a hypothetical account. That percentage generally increases with your age and service." The 1999 Notice also explained that "the hypothetical account earns interest credits at a rate based on 30-year Treasury bonds." The 1999 Notice did not, however, indicate the formula that the Plan would apply in order to achieve compliance with statutory accrual principles.

The Plan was again amended, effective January 1, 2002. This amendment incorporated the same cash balance regime adopted in 2000, but recalibrated the range of Benefit Credits allotted annually to employees' accounts. Pursuant to this amendment, Benefit Credits ranged from one and one-half percent for participants under age twenty-nine in their first five years of service, to six percent for those fifty-five or older with fifteen or more years of service. Citigroup employed a notification process similar to the process it utilized in 1999. Pursuant to ERISA § 204(h), an information package dated December 2001 was sent to Plan participants informing them of the amendment. As with the 1999 Notice, there was no

mention of the means by which the Plan would ensure compliance with ERISA's accrual requirements.

C. The Minimum Benefit Accrual Tests

Cash balance plans, such as the Citibuilder Plan are defined benefit plans within the meaning of ERISA because they guarantee a prescribed level of retirement benefits. *Esden*, 229 F.3d at 158; *see also* 29 U.S.C. § 1002(35). All defined benefit plans must comply with ERISA's minimum benefit accrual rules, which are primarily designed to minimize "backloading." *Langman v. Laub*, 328 F.3d 68, 71 (2d Cir. 2003); H.R. Rep. No. 93-807 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4688. Backloading occurs when a plan awards a covered employee disproportionately higher benefit accruals for later years of service. *Langman*, 328 F.3d at 71. Thus, while ERISA does not require pension plans to pay out any specific dollar amount, it does regulate the rate at which benefits accrue. 29 U.S.C. § 1054(b)(1); *see Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743, 124 S. Ct. 2330, 159 L. Ed. 2d 46 (2004). Toward that end, ERISA sets forth three alternative minimum benefit accrual tests; pension plans are required to pass one. 29 U.S.C. § 1054(b)(1) (A)-(C). Two of these tests are implicated by this appeal: the 133 1/3 test and the fractional test.

Under the 133 1/3 test, the rate of benefit accrual in any future year may not be more than one-third greater than the rate in the current year. 29

U.S.C. §1054(b)(1)(B). This test prevents "backloading" by cabining fluctuation in accrual rates. As the Supreme Court explained, the 133 1/3 test "permits the use of any accrual formula as long as the accrual rate for a given year of service does not vary beyond a specified percentage from the accrual rate of any other year under the plan." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514 n.9, 101 S. Ct. 1895, 68 L. Ed. 2d 402 (1981).

The fractional test "is essentially a pro rata rule under which in any given year, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age." *Id*; *see also* 29 U.S.C. § 1054(b)(1)(C). In other words, this test uses a fractional calculation based on years of service to ensure that benefits accrue at a rate that approximates the prorated amount of the total benefits that the employee would receive if he or she worked until normal retirement age. One unique feature of the fractional test formula is that it uses the employee's current compensation rate to project the total benefits available at retirement. This means that the formula assumes *no* salary increases for the employee.

Article 4.1(e) of the Citibuilder Plan sets forth its mechanism for compliance with ERISA's minimum accrual standards. Although the percentage of compensation that Citigroup contributes to participants' accounts increases by more than one

third, based on increasing age and service years, "the Plan may still qualify under the 133 1/3 percent test because of the value of the interest credits compounded annually through normal retirement age." *Esden*, 229 F.3d at 167 n.18. Compliance with the 133 1/3 percent rule depends upon the balance between Benefit Credits, which increase with age, and Interest Credits, which decrease with age. Compliance is also contingent upon the variable interest rate remaining sufficiently high to counterbalance the increase in Benefit Credits with the decrease in Interest Credits.

4 The full text of Article 4.1 is set out in the district court's opinion. *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323, 329-30 (S.D.N.Y. 1006) ("Citigroup I").

In order to ensure compliance, regardless of fluctuations in the interest rate, Citigroup's Plan provides that when the rate of accrual does not satisfy the 133 1/3 test, participants' accounts will be made to comply with the fractional rule of accrual upon the termination of the period of employment. If the variable interest rate falls to a level at which compliance with the 133 1/3 test is not possible, Citigroup will calculate the minimum account requirements pursuant to Article 4.1(e) and then add the difference to the participants' accounts. Under the interest rates in effect in 2000 and 2001, the Plan was in compliance with the 133 1/3 test, and neither Article 4.1(e) nor the fractional test was implicated. However, beginning in 2002, a change in the interest rate for

some participants. Article 4.1(e) was invoked with respect to the affected participants in order to bring the Plan into compliance with ERISA's minimum accrual rules.

D. ERISA's Notice Requirement

In order to safeguard benefits promised to employees and to ensure that employees can form realistic expectations about the benefits that they will receive, ERISA prohibits employers from reducing the accrual of future benefits without adequate notice to plan participants. *See Frommert v. Conkright*, 422 F.3d 254, 263 (2d Cir. 2006). At all times relevant to the amendments at issue on this appeal, ERISA § 204(h) provided that a pension plan:

> may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to . . . each participant in the plan.

29 U.S.C. § 1054(h).

5 The statute was subsequently amended, but it is this version that controls in this appeal.

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See § 659(b), 115 Stat. 38, 139-41 (2001).

Guidelines promulgated by the Internal Revenue Service ("IRS") clarify that notice is required when an amendment is "reasonably expected to change the amount of the future annual benefit commencing at normal retirement age." *Notice of Significant Reduction in the Rate of Future Benefit Accrual*, 63 Fed. Reg. 68,687, 68,680 (Dec. 14, 1998 (codified at 26 C.F.R. pts. 1, 602). Whether an amendment creates a "significant reduction" in accrual rates is determined "based on reasonable expectations taking into account the relevant facts and circumstances at the time the amendment is adopted." *Id.* at 68,681. According to the IRS guidelines, notices may contain "a summary of the amendment, rather than the text of the amendment, if the summary is written in a manner calculated to be understood by the average plan participant." *Id.* at 68,682; *se also Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 72 (3d Cir. 2007).

II. PROCEEDINGS IN THE DISTRICT COURT

Plaintiffs filed consolidated actions on behalf of themselves and a class of similarly situated individuals against Citigroup and its Plan's Administration Committee, alleging that hc Citibuilder Plan violates ERISA. *In re Citigroup Pension Plan ERISA Litig.*, 470 F Supp. 2d 323, 326 (S.D.N.Y. 2006) ("Citigroup I"). Plaintiffs seek injunctive and declaratory relief as well as monetary damages. Plaintiffs allege, among other things, that

the Plan is impermissibly backloaded due to insufficient Interest Credits; that the Plan's fractional test method of computing accrued benefits is precluded under ERISA; and that Defendants failed to provide Plan participants with adequate notice that the 2000 and 2002 cash balance amendments would reduce the rate of future benefit accrual. *Id.* at 326-27.

On December 12, 2006, on cross-motions for summary judgment, the district court denied Defendants' motion for summary judgment and granted Plaintiffs' motion in part. *Id.* at 327. The court ruled, in relevant part, that, as a matter of law, the Plan violated ERISA's minimum benefit accrual rules, 29 U.S.C. § 1054(b)(1)(A)-(C); and, that the Plan violated ERISA's requirement that Plan administrators provide advance notice of significant reductions in the rate of future benefit accrual, as set out in 29 U.S.C. § 1054(h). *Id.* at 337-40.

The district court concluded that "[b]y its very terms, the fractional rule may only be applied to participants with ten or fewer years of service," and the 'the only applicable accrual test is the 133 1/3 rule" because Citigroup utilizes a "career average plan." *Id.* at 337. The court went on to opine that the "Citigroup formula . . . contravenes the well-acknowledged purpose of the mandatory accrual tests, which is to prevent the backloading of benefits." *Id.* at 337-38.

With respect to the § 204(h) notices provided by Citigroup, the district court found that they "omitted

any mention of the benefit formula's unorthodox approach to calculating benefits and monitoring accrual rates," and that "defendants' failure to either include or summarize Article 4.1(e) in the notices violated § 204(h)." *Id.* at 339. The district court found that the notice provided was "substantively inadequate," and rejected Defendants' argument that the notice claims should be "dismissed for plaintiffs' failure to show that they suffered any prejudice." *Id.* at 339-40 & n.88.

By Opinion and Order dated December 19, 2006, the district court certified a class of plaintiffs consisting of all individuals who were participants in the Plan at any time on or after January 1, 2000, their beneficiaries and estates, and those who are currently subject to the Plan's cash balance formula under ERISA. *In re Citigroup Pension plan ERISA Litig.*, 241 F.R.D. 172 (S.D.N.Y. 2006).

On April 4, 2007, the district court clarified its summary judgment ruling with respect to its finding that Defendants had provided inadequate § 204(h) notice. *In re Citigroup Pension Plan ERISA Litig.*, No. 05-cv-5296 (SAS), 2007 U.S. Dist. LEXIS 27004, 2007 WL 1074912 (S.D.N.Y. Apr. 4, 2007) ("Citigroup II"). The court concluded that application of the fractional test under the Citigroup Plan was a "deliberate end-run around statutory guidelines that effectively kept the Plan's accrual rates below the minimum prescribed by Congress." 2007 U.S. Dist. LEXIS 27004, [WL] at *3. The court held that "[i]nsofar as [its] ruling [of

December 12, 2006] suggests that the § 204(h) notices were required to describe how the amendments were going to reduce rates of benefit accrual, their lack of detail was of secondary importance to their material omission of an unorthodox yet vital component of the Plan's formula." 2007 U.S. Dist. LEXIS 27004, [WL] at *4. The court stated "that had the notices merely identified the Plan's novel compliance mechanism, those few words would likely have been adequate." *Id.* However, because the notice omitted this information, the court's prior conclusion that it was defective remained unchanged. *Id.*. On appeal, Plaintiffs contend that this "clarification" constitutes an abuse of discretion on the part of the district court because it prejudiced their notice arguments without an opportunity to be heard.

On November 20, 2007, the district court issued a ruling directing Defendants to adjust the Plan formula in a manner that would bring it into full compliance with the 133 1/3 minimum benefit accrual test. *In re Citigroup Pension Plan ERISA Litig.*, No. 05-cv-5296 (SAS), 2007 U.S. Dist. LEXIS 86145, 2007 WL 4205855 at *3 (S.D.N.Y. Nov. 20, 2007) ("Citigroup III"). The court rejected Plaintiffs' arguments that further relief was appropriate on the backloading and notice claims. *Id.*

Pursuant to *Federal Rule of Civil Procedure 54(b)*, the district court entered final judgment on the backloading and notice claims, and simultaneously stayed enforcement of that judgment pending this

appeal. Defendants appeal from those portions of the final judgment that find violations of ERISA's minimum benefit accrual and notice provisions. Plaintiffs thereafter cross-appealed from the final judgment.

III. DISCUSSION

6 It is well known that we review a grant of summary judgment *de novo*. *State St. Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 135 (2d Cir. 2003). When, as in this case, there are no material facts in dispute, this court is charged with making a determination as to whether the district court properly applied the relevant law. *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 155 (2d Cir. 2003).

A. The Fractional Rule May be Applied to Cash Balance Plans

the district court concluded that the fractional test can never be applied to career average plans like the cash balance plan at issue in this case. The court determined "[b]y its very terms, the fractional rule may only be applied to participants with ten or fewer years of service." *Citigroup I*, 470 F. Supp. 2d at 337. On appeal, both Citigroup and Plaintiffs agree that a fractional test may legally be applied to a cash balance plan without violating ERISA's minimum benefit accrual rules. The American Benefits Council, as

amicus curiae, joins this position. In our view, the position now advanced by all the litigants and the *amicus curiae* is the correct interpretation of ERISA. Contrary to the conclusion of the district court, ERISA § 204(b) provides that all defined benefit plans may use any of the three minimum accrual tests to comply with anti-backloading rules. 29 U.S.C. § 1054(b)(1)(A)-(C).

The fractional rule does not, in fact, state that it may only be applied to participants with ten or fewer years of service. Rather, the rule notes only that in calculating benefits owed, it "tak[es] into account no more than the 10 years of service immediately preceding his separation from service." 29 U.S.C. § 1054(b)(1)(C). The provision is an instruction as to how to perform the accrual calculation, not a blanket prohibition on the types of plans that can utilize the fractional rule. Further, compliance with the fractional rule is tested "upon [the employee's] separation from [the employer's] service," not, as the district court concluded, on a "year-by-year basis." 26 U.S.C. § 411(b)(1)(C); 29 U.S.C. § 1054(b)(1)(C); *Citigroup I*, 470 F. Supp. 2d at 338.

> 7 Several district courts in other circuits have also adopted the district court's interpretation. *See, e.g., Wheeler v. Pension Value Plan for Employees of the Boeing Co.*, No. 06-cv-500 (DRH), 2007 U.S. Dist. LEXIS 65840, 2007 WL 2608875, at *7 (S.D. Ill. Sept. 6, 2007); *Sunder v. U.S. Bank Pension Plan*, No. 05-cv-

01153 (ERW), at *11 (E.D. Mo. Feb. 16, 2007); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 843 (S.D. Ind. 2000). But, for the reasons discussed in this opinion, we find it unpersuasive.

Congress has authorized the IRS to issue binding regulations under ERISA, and we have noted that these regulations "represent[] the fair and considered judgment of the IRS" and are therefore "entitled to deference." *Esden*, 299 F.3d at 168; *see also Notice of Significant Reduction in the Rate of Future Benefit Accrual*, 68 Fed. Reg. 17,277 (Apr. 9, 2003) (codified at 26 C.F.R. pts. 1, 54 & 601). In fact, the IRS "was given primary jurisdiction and rule-making authority over ERISA's funding, participation, benefit accrual and vesting provisions." *Esden*, 229 F.3d at 157 n.2. Both the IRS regulations and *Revenue Ruling 2008-7* contain an example of a defined benefit plan tested under the fractional rule where the plan's benefit formula takes into account more than ten years of employment. *See* 26 C.F.R. § 1.411(b)-1(b)(3)(iii)(Ex.2); *Rev. Rul.* 2008-7, 2008-7 I.R.B. 419; *see also* I.R.S. *Notice* 96-8, 1996-1 C.B. 359 (Jan. 18, 1996) (stating that cash balance plans may comply by utilizing any one of the three minimum accrual tests). Thus, the district court erred in concluding that application of the fractional test is *per se* illegal in the context of cash balance plans.

B. The Application of the Fractional Test to the Citibuilder Cash Balance Plan Does Not Violate ERISA's Minimum Benefit Accrual Rules

The district court concluded that under ERISA, benefits must accrue in a way so that in any given year, the amount of accrued benefit complies with the fractional rule's minimum standards. Article 4.1(e) of the Citibuilder Plan, calls for the compliance calculation to occur when benefits are paid out. If, on the determination date, the amount of accrued benefit does not meet the fractional test, Citigroup adds money to the account to bring it into compliance with the minimum accrual requirements. Plaintiffs argue that this amounts to impermissible backloading. The district court characterized Article 4.1(e) as "unorthodox," and agreed with Plaintiffs that it was a "novel end-run around ERISA's minimum accrual standards." *Citigroup I*, 470 F. Supp. 2d at 337-38. We disagree; the text of ERISA dictates a different result.

The provision governing the fractional rule states that a defined benefit plan, which includes a cash balance plan, "satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled *upon his separation* from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation." 29 U.S.C. § 1054(b)(1)(C) (emphasis added). Thus, by its own language, the

fractional rule indicates that the relevant calculations are to be made at the time of separation.

The statute's plan language is in accord with the purpose of the minimum benefit accrual rules. Minimum benefit accrual rules under ERISA are designed to prevent participants who leave their employment before normal retirement age from receiving benefits that are disproportionately low relative to benefits they would have received if they had continued to work until normal retirement age. *See, e.g.*, *Langman*, 328 F.3d at 71; *Hurlie v. S. Cal. Gas Co.*, 539 F.3d 1024, 1033 (9th Cir. 2008). The fractional test employed by Article 4.1(e) accomplishes this statutory objective by guaranteeing departing employees a benefit proportional (based upon years of service) to the benefit they would have received had they worked until normal retirement age. Under this test, adjustments are made to departure-time benefits to ensure that the participant is not penalized for leaving prior to normal retirement age. The rate of benefit accrual during a participant's employment is unimportant under this test, as long as proportional benefits are paid at the time of departure.

Revenue Ruling 2008-7 is instructive in the case at bar; it provides an example in which it first tests the plan using the 133 1/3 percent method and finds it satisfied for some, but not for all, participants. *Rev. Rul. 2008-7*. The example provided by the Revenue Ruling then applies the fractional rule to those participants for whom the plan did not satisfy the 133

1/3 test. *Id.* The Ruling specifically states that this is "not a classification that is structured to evade the accrued benefit requirements of § 411(b)(1)(A), (B), and (C) or §1.411(b)-1." *Id.* Again, this court has noted that "[r]evenue rulings issued by the I.R.S. are entitled to great deference, and have been said to have the force of legal precedent unless unreasonable or inconsistent with the provisions of the Internal Revenue Code." *Gillespie v. United States*, 23 F3d 36, 39 (2d Cir. 1994) (quotation marks omitted). Here, the Revenue Ruling provides a reasonable interpretation of the statutory language. Therefore, we hold that Article 4.1(e)'s application of the fractional test at the time of separation from employment is proper, and that it achieves the purposes of ERISA's minimum benefit accrual rules.

C. Citigroup Complied with ERISA's § 204(h) Notice Requirements

In its original opinion, the district court incorrectly reasoned that because the notices given by Citigroup "omitted any mention of the benefit formula's unorthodox approach to calculating benefits and monitoring accrual rates," and because the court ultimately concluded that the formula violated ERISA, "defendants' failure to either include or summarize Article 4.1(e) in the notices violated §204(h)," *Citigroup I*, 470 F. Supp. 2d at 339. Essentially, the district court converted a perceived substantive defect in the Plan into a basis for finding that the notice given was defective. The district court recognized this

error and attempted to cure it in its Memorandum Opinion and Order of April 4, 2007. The court suggested "that had the notices merely identified the Plan's novel compliance mechanism," and presumably alerted the participants to the existence of Article 4.1(e), they would have been sufficient. *Citigroup II*, 2007 U.S. Dist. LEXIS 27004, 2007 WL 1074912, at *4. But, because the notice did not provide participants with this information, the lower court still found that it failed to comply with ERISA § 204(h). *Id.* We disagree with both of the district court's formulations of ERISA's § 204(h) notice requirements, and find that the Citibuilder Plan Administrator complied with ERISA § 204(h).

As an initial matter, we reject Citigroup's argument that Plaintiffs lack standing to maintain a notice claim under § 204(h). The cases Citigroup cites for this contention are inapposite; they discuss a plan participant's ability to maintain a claim pertaining to the statutory requirement to provide a Summary Plan Description ("SPD"). *See, e.g.*, *Weinreb v. Hosp. For Joint Diseases Orthopaedic Inst.*, 404 F.3d 167, 170 (2d Cir. 2005) (citing 29 U.S.C. §§ 1021(a), 1022(a)-(b), and 1024(b)). ERISA specifically sets out the information that must be contained in a SPD. 29 U.S.C. § 1022(b). "Among other things, [the] SPD must set out the 'circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.'" *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 580-81 (2d Cir. 2006) (quoting 29 U.S.C. § 1022(b)). This circuit has held that to prevail on a

claim alleging that a SPD provided deficient notice, a plaintiff must show that he or she was "likely to have been harmed," or prejudiced. *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003). To apply this "likely prejudice" standard in this case would be to conflate the requirements for bringing a claim challenging the sufficiency of a SPD under 29 U.S.C. § 1024(b) with those governing the provision of notice under 29 U.S.C. § 1054(h). *See Burke*, 336 F.3d at 113-114.

Notice of an amendment to a pension plan "need not contain an exact quotation of the text of the amendment, but may contain 'a summary of the amendment . . . if the summary is written in a manner calculated to be understood by the average plan participant and contains the effective date.'" *Register*, 477 F.3d at 72 (quoting *Scott v. Admin. Comm. of the Allstate Agents Pension Plan*, 113 F.3d 1193, 1200 (11th Cir. 1997) (quoting 26 C.F.R. § 1.411(d-6T (1996))). The notices distributed by Citigroup to all Plan participants properly provided a general summary off how the cash balance plan would function. *See Osberg v. Foot Locker, Inc. & Foot Locker Ret. Plan*, ___ F. Supp. 2d ___, No. 07-cv-1358 (DAB), 2009 U.S. Dist. LEXIS 84465, 2009 WL 2971834, at *9 (S.D.N.Y. Sept. 16, 2009) (discussing applicable version of ERISA § 204 and concluding that it "required the disclosure of only the amendment and its effective date, and did not seek to regulate the content of the communication any further").

8 Congress amended ERISA in 2002 to provide that an amendment must "be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information . . . to allow applicable individuals to understand the effect of the plan amendment." 29 U.S.C. § 1054(h)(2). We express no view on whether notice given by Citigroup would satisfy current law. Rather, we analyze the law in effect at the time relevant to Plaintiffs' challenge.

ERISA does not require that notice pursuant to § 204(h) include a description of how the plan will comply with minimum benefit accrual rules. The Citigroup 1999 and 2001 Notices properly alerted Plan participants that the amendments could result in a reduction in rates of benefit accrual. The Notices also made disclosures regarding the Benefit Credit formula and Plan interest rate, which permitted participants to compare this formula to their prior benefits formula. *Section 204(h)* only requires notice of plan amendments that "provide for a significant reduction in the rate of future benefit accrual." 29 U.S.C. § 1054(h). Article 4.1(e) does not, in and of itself, reduce participants' benefits. Rather, it increases benefits when necessary to ensure compliance with ERISA's minimum accrual rules. The participants had proper notice that the conversation to a cash balance plan could have the effect of a reduction of rates of benefit accrual. The 1999 and 2001 Notices complied with the requirements of ERISA § 204(h).

IV. CONCLUSION

Based on the foregoing analysis, the district court's order of December 11, 2006, granting partial summary judgment to Plaintiffs is hereby REVERSED and the complaint is DISMISSED.

APPENDIX F - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 12, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of January, two thousand ten.

- x

Michael Lonecke, Raymond Duffy, Anne Nelson, Robert S. Fash, and Craig A. Harris, Individually and on behalf of all those similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

William Woodward, individually and on behalf of all those similarly situated,

Plaintiff-Appellee,

v.

08-0459-cv (L)
and 08-0538-cv (XAP)

Citigroup Pension Plan, Plans Administration Committee of Citigroup, Inc., Citigroup, Inc.,

Appendix F

Defendants-Appellants-Cross-Appellees

- x

Michael Lonecke, Raymond Duffy, Anne Nelson, Robert S. Fash, and Craig A. Harris, Individually and on behalf of all those similarly situated, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for a rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk

By: _____
Frank Perez, Deputy Clerk

Supreme Court, U.S.
FILED
MAY 26 2010
OFFICE OF THE CLERK

No. 09-1229

In the
Supreme Court of the United States

MICHAEL LONECKE, RAYMOND DUFFY, ANNE NELSON, ROBERT S. FASH, and CRAIG A. HARRIS, Individually and on behalf of all those similarly situated, and WILLIAM WOODWARD, Individually and on behalf of all those similarly situated,

Petitioner,

v.

CITIGROUP PENSION PLAN, PLANS ADMINISTRATION COMMITTEE OF CITIGROUP INC, CITIGROUP INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the fractional test for determining compliance with ERISA's minimum benefit accrual requirements is applied on a year-by-year basis or, as the plain language of the statute, 26 U.S.C. § 411(b)(1)(C), dictates, "upon . . . separation from the service"?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Citigroup Pension Plan, the Plans Administration Committee of Citigroup Inc. and Citigroup Inc. state that they have no parent corporations. No publicly held corporation owns 10% or more of Citigroup Inc.'s stock.

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The final opinion below is *Lonecke v. Citigroup Pension Plan*, 584 F.3d 457 (2d Cir. 2009). The decisions of the district court are *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006), 241 F.R.D. 172 (S.D.N.Y 2006); No. 05-Civ-5296, 2007 U.S. Dist. LEXIS 27004 (S.D.N.Y. Apr. 4, 2007); and No. 05-Civ-5296, 2007 U.S. Dist. LEXIS 86145 (S.D.N.Y. Nov. 20, 2007).

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Petitioners ask this Court to grant review of a decision that correctly applied the plain language of the Employee Retirement Income Security Act ("ERISA") in a way that conflicts with no Supreme Court precedent and no decision in any other court. Indeed, perhaps because it arises from apparently unique features of the ERISA plan at issue, the question presented has never been *considered* in any other case, and is extremely unlikely to recur.

This case involves a Citigroup cash balance pension plan that includes a "top-up" provision, Article 4.1(e) of the Plan, that adds to a participant's benefits when necessary to ensure compliance with ERISA's minimum benefit accrual rules. Set out in ERISA section 204(b)(1)(A), (B) and (C), these rules establish three alternative minimum tests for the rate at which benefits accrue, in order to prevent "backloading" — a circumstance in which plans grant a disproportionate amount of pension credits to workers in their last years of employment. One of the permitted statutory tests is the "fractional test" of ERISA section 204(b)(1)(C). Article 4.1(e) of the Plan sets out a formula that tracks the statutory requirements and mandates that additional amounts be awarded, in satisfaction of the fractional test, if a participant's benefits at separation from service would otherwise not satisfy the minimum ac-

crual rules. In this way, Plan drafters guaranteed that ERISA's minimum accrual rules would be satisfied.

Petitioners' principal argument in the district court was that — contrary to the terms of the statute — no cash balance plan is permitted to use the fractional test to judge compliance with minimum benefit accrual rules. After persuading the district court of that erroneous proposition, Petitioners reversed field on appeal, conceding in the Second Circuit that the fractional test *is* available. The Court of Appeals properly held that the statute clearly permits application of the fractional test in a cash balance plan.

Instead of the central position they advanced in the district court, on appeal Petitioners emphasized a fallback argument. They claimed that the Citigroup Plan did not correctly apply the fractional test because it did not perform a fractional test calculation, and did not award additional sums in satisfaction of that test, each year for each participant. This position, however, is just as inconsistent with the terms of the statute as the argument Petitioners abandoned. Contrary to Petitioners' contentions, the statute states that a pension plan complies with the minimum benefit accrual rules "if the accrued benefit to which any participant is entitled *upon his separation from the service*" satisfies the fractional test. I.R.C. § 411(b)(1)(C); 26 U.S.C. § 411(b)(1)(C) (emphasis added). This wording is in clear contrast to the language used in describing another minimum benefit accrual test, which is to be applied each year. The Second Circuit, relying on this plain language, properly rejected Petitioners' argument.

Additionally, the question presented in this case is unlikely to recur and of little national importance.

We know of no other plan that uses the language at issue, language the district court called "unorthodox." And, as we discuss below, recent amendments to ERISA make it extremely unlikely that similar provisions will be considered in the future.

While Petitioners charge that Respondents wrongfully denied benefits to Plan participants, in fact, the opposite is true -- the terms of the Plan were drafted to make it absolutely certain that participants will receive everything to which they are entitled. As the Second Circuit noted, ERISA's minimum benefit accrual rules "are designed to prevent participants who leave their employment before normal retirement age from receiving benefits that are disproportionately low relative to the benefits they would have received if they had continued to work until normal retirement age *Lonecke v. Citigroup Pension Plan*, 584 F.3d 457, 469 (2d Cir. 2009) . Article 4.1(e) of the Plan ensures that this statutory purpose is served.

In short, Petitioners seek error correction where there is none, regarding a legal question of little national importance now or in the future. This Court should accordingly deny certiorari.

Procedural History

The unusual procedural history of this case reflects Petitioners' shifting legal position. Petitioners filed consolidated actions on behalf of themselves and a class of similarly situated individuals against Citigroup and its Plans Administration Committee, alleging that Citigroup's Plan violates ERISA. *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323, 326 (S.D.N.Y. 2006) ("*Citigroup I*"). On December 12, 2006,

the district court denied Respondents' motion for summary judgment and granted Petitioners' motion for summary judgment in part. *Id.* at 327. The court held that the Plan violated ERISA's minimum benefit accrual rules, ERISA § 204(b)(1)(A)-(C); 29 U.S.C. § 1054(b)(1)(A)-(C). The court ruled that "the fractional rule may only be applied to participants with ten or fewer years of service," and that "the only applicable accrual test is the 133 1/3 rule," which the court concluded the Citigroup Plan violated. *Citigroup I*, 470 F. Supp. 2d at 337-38. On November 20, 2007, the district court issued a ruling directing Respondents to adjust the Plan formula in a manner that would bring it into compliance with the 133-1/3% minimum benefit accrual test. *In re Citigroup Pension Plan ERISA Litig.*, No. 05-cv-5296 (SAS), 2007 U.S. Dist. LEXIS 86145, at *8-9 (S.D.N.Y. Nov. 20, 2007). The court rejected Petitioners' arguments that further relief was appropriate on the backloading and notice claims. *Id.* [1]

Respondents promptly appealed. After Respondents filed their opening brief, however, Petitioners abandoned their argument that cash balance plans may not use the fractional test. Contradicting what they re-

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[1] The district court held, and Petitioners do not challenge here, that the Plan could be brought into compliance with ERISA by making adjustments so that it would satisfy the 133-1/3% test, *In re Citigroup Pension Plan ERISA Litig.*, 2007 U.S. Dist. LEXIS 86145, at *8-9, an adjustment of about $40 million or an average of less than $400 per Plan participant. Further, under equitable principles, any reformation of the Plan would take into account factors likely resulting in even smaller amounts. ERISA § 502(a)(1)(3); 29 U.S.C. § 1132(a)(1)(3). Petitioners vastly overstate the amount of money actually at issue per pensioner by relying on flawed and disputed hypotheticals. (Pet. at 19; Def. Br. Opp. S.J. at 4-5.)

peatedly told the district court on summary judgment and at the remedies phase, Petitioners' opening appellate brief announced that they "agree" with Respondents' argument "that the fractional rule can indeed be applied to Citigroup's Cash Balance Plan." (Pl. Br. at 33-34.) Petitioners even criticized the district court for committing reversible error by holding that the fractional test is inapplicable to the Plan — that is, for making the mistake of adopting Petitioners' central argument. (*See, e.g.*, Pl. Br. at 11.)

After convincing the district court to hold that the Plan was required to use the 133-1/3% test and only the 133-1/3% test, Petitioners asked the Second Circuit to order that the Plan *must* use the fractional test — not the fractional test provided for in the statute and regulations, but a special version of the test of Petitioners' own invention. Thus, Petitioners say that the fractional test must be applied (and a benefit adjustment made) every year, not just at separation from service. On October 19, 2009, the Second Circuit squarely rejected this argument, holding that "compliance with the fractional rule is tested 'upon [the employee's] separation from [the employer's] service.'" *Lonecke*, 584 F.3d at 468 (quoting I.R.C. § 411(b)(1)(C); 26 U.S.C. § 411(b)(1)(C) (alteration in original)). Petitioners unsuccessfully sought rehearing and rehearing en banc, though they did not raise in that petition whether the fractional test should be applied each year. This petition followed.

Factual Background

In 1999, Citigroup decided to include a cash balance pension plan in its menu of retirement benefits, which included (and still includes) a 401(k) plan and

other retirement programs. (*See* Joint App. at A-66, ¶ 15 and A-335, Ex. 4.) Cash balance plans are seen as having several benefits. They allow greater portability of benefits in a workplace where employees have increasing mobility and are considered easier to understand than traditional pension plans. *See Esden v. Bank of Boston*, 229 F.3d 154, 158 n.5 (2d Cir. 2000).

ERISA divides pension plans into two categories: defined benefit plans and defined contribution plans. Cash balance plans are defined benefit plans within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35), because they guarantee a prescribed level of retirement benefits. Benefits accrue, however, in a manner that resembles a defined contribution plan. The plan establishes a hypothetical account for each participant. Benefits are credited to the account each year based on a prescribed percentage of compensation, which may vary depending on the employee's age and/or years of service ("Benefit Credits"). Interest is also credited to the account, typically at a rate tied to an extrinsic index ("Interest Credits"). At retirement age, participants become entitled to a lump sum payout based on the accumulated value of their accounts, or to an actuarially equivalent pension. *See Esden*, 229 F.3d at 158.

Until the Plan was frozen on December 31, 2007, it annually awarded Benefit Credits to participants as a percentage of that year's total compensation. Under the Plan's formula, the percentage increased with age and years of service. Benefit Credits ranged from 2% for participants under age 25 in their first ten years of service to 7% for participants 50 years or older with 15 or more years of service. (*See* Joint App. at A-69, ¶ 24.) When the Plan was amended effective January 1, 2002, those percentages were reduced somewhat, ranging

from 1.5% for participants under age 29 in their first five years of service to 6% for those 55 or older with 15 or more years of service. (*See id.* at ¶ 25.) This amendment also brought new participants into the Plan (*see* Joint App. at A-68, ¶ 19), and for many of them the post-amendment formula was an improvement.

Interest Credits, which continue to accrue despite the freeze, vary in accordance with the 30-year Treasury rate. (*See* Joint App. at A-68, ¶ 22.) This is the same rate prescribed by the Internal Revenue Code for determining the present value of a participant's retirement benefits. *See* I.R.C. § 417(e), 26 U.S.C. § 417(e). When the Plan was designed, guidance from the Treasury Department recommended that cash balance plans use this floating rate to avert "whipsaw" — a potential violation of ERISA in which the present value of a participant's accrued benefit at retirement age exceeds the amount in the cash balance account. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359.

Like all defined benefit plans, the Plan must comply with ERISA's minimum benefit accrual rules, designed to prohibit "backloaded" plans that award disproportionately higher benefit accruals for later years of service. Toward that end, ERISA section 204(b)(1)(A), (B) and (C) sets forth three alternative minimum benefit accrual tests, at least one of which must be satisfied by a plan. ERISA § 204(b)(1)(A)-(C); 29 U.S.C. § 1054(b)(1)(A)-(C).

The Plan is designed to comply with the minimum benefit accrual rules through the use of either of two of the three statutory tests: the 133-1/3% test or the fractional test. Under the 133-1/3% test, described in ERISA section 204(b)(1)(B), the rate of benefit ac-

crual in any particular year cannot be more than one-third greater than the rate in any prior year. The fractional test, set out in ERISA section 204(b)(1)(C), looks at whether a departing participant has accrued a benefit at least proportionate to his or her years of service. Under the test, the ratio of the benefit accrued at the time of separation from service to the total benefit that would have accrued if the participant had continued working until normal retirement age (65 for this Plan) must equal or exceed the ratio of the years of service worked compared to total years of service until normal retirement age.

In applying both tests, the benefit accrual includes Interest Credits projected out to normal retirement age. For that reason, a formula like that of the Plan that uses the floating interest rate recommended by the IRS may satisfy the 133-1/3% test in one year, but later fall out of compliance as interest rates change. The "top-up" provision of Article 4.1(e) was included in the Plan to ensure compliance with the minimum benefit accrual rules regardless of interest rate movements. Article 4.1(e) provides that if the Plan is not in full compliance with the 133-1/3% test, it will instead comply with the fractional test, by crediting to the account of departing participants an amount necessary to satisfy that test. (*See* Joint App. at A-79, ¶ 51.) Because the fractional test by its terms looks at benefits accrued at the time of separation from service, Article 4.1(e) adds to benefit accruals at that point if an adjustment is needed to comply with the fractional test. In effect, Article 4.1(e) writes the fractional test into the Plan, to guarantee compliance with the statute.

It is undisputed that, under the benefit formula and interest rates in effect in 2000 and 2001, the Plan

was in compliance with the 133-1/3% test so that Article 4.1(c) did not come into play. (*See id.* at ¶ 47.) The combination of the amended Plan's new formula and prevailing interest rates, however, brought the Plan potentially out of compliance with the 133-1/3% test beginning in 2002. (*See id.* at ¶ 48.) For the post-2001 period, therefore, application of Article 4.1(c) ensured that the Plan satisfied the minimum benefit accrual rules. (*See id.* at ¶ 49.)

REASONS FOR DENYING THE PETITION

The Second Circuit Applied the Plain Language of the Statute

As the Second Circuit properly recognized, "compliance with the fractional rule is tested upon [the employee's] separation from [the employer's] service, not . . . on a year-by-year basis." *Lonecke*, 584 F.3d at 468 (internal citations and quotation marks omitted) (alteration in original). Indeed, the statute expressly states that the fractional test is performed upon "separation from service." That language — as well as similar language in the regulations — disposes of Petitioners' claim that the fractional test must be performed each year.

Article 4.1(e) of the Plan provides that adjustments be made at separation from service for the simple reason that ERISA section 204(b)(1)(C), which sets out the fractional test, requires it. The statute states in relevant part: "A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled *upon his separation from the service*" is in accord with the ratio computed under the test. ERISA § 204(b)(1)(C); 29 U.S.C. § 1054(b)(1)(C) (emphasis added). The only reasonable construction of the italicized language is to require application of the test when a participant separates from service, just as Article 4.1(e) mandates.

Significantly, this language does not appear in the statute's discussion of the 133-1/3% test in ERISA section 204(b)(1)(B), which tests compliance in "a particular plan year." ERISA § 204(b)(1)(B); 29 U.S.C. § 1054(b)(1)(B). By incorporating the statutory language — "separation from the service" — directly into its text, Article 4.1(e) is designed to guarantee that the minimum benefit accrual rules are satisfied. If the drafters of ERISA had meant for the fractional test to be applied in each year, they would have said so — rather than choosing language that distinguishes this test from the 133-1/3% test. The regulations echo the statute. Those concerning the fractional test focus on separation from service, while the 133-1/3% test regulations speak of particular years. *Compare* 26 C.F.R. § 1.411(b)-1(b)(2) (testing for compliance with 133-1/3% test in "a particular plan year") *with* 26 C.F.R. § 1.411(b)-1(b)(3) (testing compliance with fractional test based on when employee "separated from the service").

The statutory text and regulations —both of which look to the date of "separation from service" in applying the fractional test — are entirely consistent with the purpose of the rule. As this Court made clear in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 & n.6 (1981), "ERISA prescribes vesting and accrual schedules, assuring that employees obtain rights to at least portions of their normal pension benefits even if they leave their positions prior to retirement." *See also Lonecke*, 584 F.3d at 469. That, of course, is precisely what Article 4.1(e) of the Plan did: it ensured that employees who left their positions before the normal retirement age would not be disadvantaged in any way. Petitioners seek not the benefit intended by ERISA, but rather hope to obtain a windfall that is not

tethered to when an employee actually leaves his or her position.

Ignoring this purpose, Petitioners cite to legislative history that they say is "inconsistent" with the "separation of service" language. Petn. 14. Were that true (it is not), the statutory text nevertheless would control. *See, e.g., U.S. v. Clark*, 454 U.S. 555, 560 (1982) ("If the statutory language is clear, it is ordinarily conclusive."); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive."). But, in any event, the language Petitioners cite is not inconsistent with the statute. To the contrary, it merely observes that the fractional test would be applied to "an employee's accrued benefit as of any applicable date," or "on the date in question" or "the date when the computation is being made." Petn. 23-24. The applicable date for the computation *is* at the time of separation from service. None of Petitioners' passages suggest that the computation must be made yearly.[2]

Petitioners also discuss at length whether the Plan may apply the 133-1/3% test in some years and the fractional test in others to the same Plan partici-

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[2] Nor do Petitioners advance their case by arguing that plan administrators are obligated to inform participants about their benefits once a year. The calculation required by the fractional test can be performed at any point in order to inform a participant of the benefit to be received if he or she separated from service at that time. *See* Rev. Rul. 2008-7, 2008-7 I.R.B. 419 (setting out illustration of how the "fractional rule benefit" can be determined "at a date").

pant. But Petitioners do not identify the issue as a question presented, and do not contend that there is any reason to grant the petition to address this question. And indeed, there is not.

First, the Second Circuit did not even address the issue. Petitioners assert that I.R.S. Revenue Ruling 2008-7 was "the sole basis" for the Court of Appeals' "contention that Citigroup may apply the 133-1/3 rule in some years and the fractional rule" in others. Petn. 14. However, the Court of Appeals did not address the question of whether a plan can apply different tests in different years *at all*. Rather, it correctly recognized that if the fractional test applies, the *only* requirement is that the accrual be appropriate at the time of separation. Because the fractional test need not be applied on a year-by-year basis, the Court of Appeals likely saw no need to reach the issue of whether a plan could apply one test in one year and a different test in the following year.

Moreover, Petitioners cite no case, and we are aware of none, holding that such a requirement exists. The explicit terms of the statute and the purpose of the fractional rule are satisfied if a plan meets its test at the time of separation from service, regardless of the accrual test previously used. Section 204 of ERISA sets out three alternative minimum benefit accrual tests. It does not state that a plan must choose one rule and is forever bound to it, as Petitioners contend. This Court should not import additional technical requirements into an already "enormously complex and detailed statute." *Varity Corp. v. Howe*, 516 U.S. 489, 516 (1996) (internal citations and quotation marks omitted). The fact that Congress did not include an exclusivity re-

quirement is a complete answer to Petitioners' argument.

As the Court of Appeals stated, "[t]he rate of benefit accrual during a participant's employment is unimportant under this test, as long as proportional benefits are paid at the time of departure." *Lonecke*, 584 F.3d at 469. Thus, the Court of Appeals observed that I.R.S. Revenue Ruling 2008-7, 2008-7 I.R.B. 419, is consistent with its conclusion that time of separation is the proper moment for application of the fractional test. The Revenue Ruling describes approvingly "an example in which it first tests the plan using the 133 1/3 percent method and finds it satisfied for some, but not for all, participants . . . [and] then applies the fractional rule to those participants for whom the plan did not satisfy the 133 1/3 test." *Lonecke*, 584 F.3d at 469 (citing 2008-7 I.R.B. 419). The Court of Appeals cited the Revenue Ruling in support of its holding that the fractional test is appropriately applied at the time of separation from service, consistent with the plain language of the statute and the purpose of the law to regulate benefit accrual at the time of separation, not on a periodic basis. *Id.*

In support of their argument, Petitioners cite to IRS Document 6390, an IRS publication created to explain a "Worksheet" used during review of retirement plans. Petitioners' argument fails on multiple levels. First, the Worksheet is *not* "an authoritative interpretation of the IRS' position on minimal accrual rates for defined benefit plans." Petn. 15 n.6. "The purpose of the Worksheet . . . and this explanation is to identify major problems in the area of *plan vesting*." I.R.S. Doc. 6390 at 1 (emphasis added). Further, even if the Worksheet were as Petitions contend, it would not be re-

motely "authoritative." Indeed it would be entitled to no deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). [3] And, if there were any question about the Worksheet, it would be conclusively resolved by the later Revenue Rule 2008-7– which is entitled to deference and explicitly endorses the use of alternative minimum accrual tests. [4]

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[3] *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law [] do not warrant *Chevron*-style deference"); *Boykin v. KeyCorp*, 521 F.3d 202, 208 (2d Cir. 2008); *De La Mota v. U.S. Dep't. of Educ.*, 412 F.3d 71, 79 (2d Cir. 2005); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000). The only case we have found that considers the precedential weight of Document 6390, *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 153 F. Supp. 2d 268, 284-85 & n.26 (S.D.N.Y. 2001), *aff'd in part, rev'd in part and remanded*, 320 F.3d 151 (2d Cir. 2003), simply "assume[d]" that the document, like letters from the IRS to plaintiffs' counsel in that case, were of "little, if any," weight. In the cases Petitioners cite, the courts merely deferred to official notices issued to solicit comments, *see, e.g., Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), or followed IRS interpretations that were independently supported and thus deemed persuasive. *See Weil v. Ret. Plan Admin. Comm. of the Terson Co., Inc.*, 933 F.2d 106 (2d Cir. 1991); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007).

[4] It describes a hypothetical plan designed to satisfy the fractional test in certain years and, depending on future conditions, the 133-1/3% test in other years: "With respect to the possibility that compensation increases for any future year may result in a plan failing to satisfy the fractional rule for that year, provisions would be necessary . . . to ensure that the plan could instead satisfy the 133 1/3% rule for that year." Rev. Rul. 2008-7, 2008-7 I.R.B. 419, 2008 IRB LEXIS 78, at *44-45.

There Is No Contrary Law

Nor is there any law contrary to the Second Circuit's opinion. Petitioners cite three cases claiming that they "support the year-by-year application of the fractional rule." Petn. 22. These cases, which do no more than mention the fractional test in passing, stand for no such proposition.

Alessi in no sense contains a holding concerning the mechanics of the fractional test. The issue in *Alessi* was whether a plan's worker compensation offset provision violated ERISA's vesting and accrual requirements. In a footnote, the Court observed that the fractional test "is essentially a pro rata rule under which in any given year, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age." *Alessi*, 451 U.S. at 514 n.9 (citing 29 U.S.C. § 1054(b)(1)(C)). That brief statement was not meant as an explanation — much less a holding — concerning the proper administration of the fractional rule.

The same is true for the other cases Petitioners cite. *Hoover v. Cumberland, Maryland Area Teamsters Pension Fund*, 756 F.2d 977 (3d Cir. 1985), considered a challenge to the reduction of accrued benefits under a defined benefit plan. In explaining how accrued benefits work, the Third Circuit stated that "[t]he plan must provide a formula under which each participant's actual accrued benefit under the plan can be determined in each plan year." *Id.* at 981. The Third Circuit made this statement in the process of establishing that the plan under consideration qualified as a defined benefit plan (and the plan under consideration did compute

benefits annually), *id.* at 981-82; the Circuit did not apply the fractional test at all, much less discuss its proper application.

Finally, Petitioners' reference to *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 269 (S.D.N.Y. 1997), similarly fails. The district court there stated that the fractional rule "is satisfied if the accrued benefit as of a given participation year is not less than the following: Normal Retirement Benefit x (Actual Years of Participation/Years of Service from Entry to Normal Retirement Age)." *Id.* at 269. This is an accurate statement of the calculation — it just says nothing about when the calculation occurs.

Therefore, Petitioners fail to identify *any* contrary law — much less a significant division in the Circuits requiring this Court's intervention. *See* Sup. Ct. R. 10(a). Additionally, Petitioners cite no law contrary to the Second Circuit's analysis regarding Revenue Ruling 2008-7, and there is no divided authority or indeed any contrary authority at all.

This Is a Question of Little National Importance

Not only has no court ever considered the question presented, but, in all likelihood, no other court will ever have occasion to do so. By all accounts, the plan at issue in this case is, as the district court noted, "unorthodox." *Citigroup I*, 470 F. Supp. 2d at 337; *see also* Petn. 19. This case is thus bound by its unique facts. What is more, the Plan at issue here has been frozen, as described above. *See supra* p. 5. Thus, the decision will have only a marginal effect on this very plan going forward.

Also significantly, the reasons for a provision like Article 4.1(e) were effectively eliminated by the passage of the Pension Protection Act of 2006 ("PPA"), which applies to distributions made after August 17, 2006. *See* PPA § 701(e)(2); I.R.C. § 411(b)(5); 26 U.S.C. § 411(b)(5). Prior to the PPA, the drafters of cash balance plans were concerned with averting whipsaw. *See supra* p. 6. At the time the Citigroup cash balance plan came into existence, the prevailing advice from the IRS was that whipsaw could be avoided by using a floating interest rate tied to the 30-year Treasury bills, as this is the same rate used to determine the lump sum present value of retirement benefits. But the floating interest rate created the risk that the plan would not satisfy one of the backloading tests — the 133-1/3% test — when interest rates moved downward. *See Lonecke*, 584 F.3d at 465 (noting that floating interest rates must remain sufficiently high in order for the 133-1/3% test to be satisfied). Using a minimum interest rate might have secured compliance with the 133-1/3% test, but it also might have compromised the Plan's ability to use the IRS's safe-harbor rate to avoid whipsaw. Thus, Article 4.1(e) provided a backup way to resolve backloading issues without creating a risk of whipsaw by satisfying the fractional test.

The PPA now allows plans to include a "reasonable" minimum interest rate to avoid backloading without concern for the pre-PPA fear that using a minimum rate would generate whipsaw; the PPA has simply eliminated whipsaw. Thus, because the 133-1/3% test will be easier to comply with, there will be less need in the future to address backloading through other means, such the stand-by fractional test in Article 4.1(e). Therefore, the legal issue presented here is unlikely to recur.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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